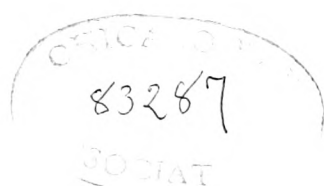


Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois



523

A

47581

MAGIKIST RUG CLEANERS,

Plaintiff-Counter-Defendant-

Appellant,

v.

J. FALDUTO and MRS. J. FALDUTO,

Defendants-Counter-Plaintiffs-

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit to recover \$135.00 for "rug cleaning and services" and a counterclaim for \$450.00 damages for alleged poor workmanship in careless "cutting and sewing" of the rug. Verdict and judgment were for defendant-counterclaimants Faldutos, and plaintiff-counterdefendant Magikist Rug Cleaners has appealed. The Faldutos have filed no brief in this court.

Magikist "picked up" the Faldutos' "wall to wall" carpet to be cleaned and relaid "wall to wall" in a new apartment. The arrangement and dimensions of rooms in the new apartment were different from those of the old. The carpet had to be recut and resewn, with a new piece and remnants added, to meet the new apartment room dimensions. The dimensions of the Faldutos' "old" living and dining room, according to the most reliable testimony, were 13 1/2' x 30'. The new dining room is 12' x 17', the living room 12' x 17 1/2'.

Testimony for Faldutos was that they knew the carpet would have to be cut, would be short in one room, but were told that in the other room it would be "wall to wall," and that they were to supply about 4 1/2 feet length of carpet to make up the deficiency. There was evidence that, when relaid, the piece in

-2-

the dining room "overlapped" and "curled up" about 6 inches, in width, and was 2 feet short in length. In the living room, the piece was 2 feet short in length and 3 inches short in width. It is not denied that plaintiff's employees trimmed the 6 inches off the dining room rug, and "did work on the living room rug."

There is no merit to the claim that the Faldutos were guilty of contributory negligence. The jury could reasonably decide that Magikist assumed the work of measuring the new apartment and that this relieved Faldutos of responsibility of getting dimensions of the rooms.

Magikist has not shown that the verdict is against the manifest weight of evidence. The jury might, with reason, have concluded that Magikist had the dimensions of the new rooms, had the dimensions of the uncut carpet, and if the work was properly done there would not have been the overlap in width in one room which had to be cut off, nor the 3 inch shortage in width in the other, nor the more than 2 feet shortage in length in each room instead of the expected 4 1/2 feet shortage in one room. The jury may have found the testimony of the Faldutos with respect to the dimensions of the new apartment more credible than that of plaintiff's, whose "measurements are lost," and whose sketches in evidence may not have been understood. The same is true about the results of the cutting work done by plaintiff.

We see no merit in plaintiff's contention that the exclusion of Exhibit "1" prejudiced its case. This exhibit, in our opinion, could not have made any difference in the jury's verdict.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10217

Agenda 2

Farm to Market Truckers Association, Inc.,
Palmer Bliss, d/b/a Palmer Bliss General
Trucking et al.,

Plaintiffs-Appellees,

vs.

Appeal from
Circuit Court
Sangamon County

George R. Ferrine, Chairman, Cyrus J. Colter,
Jesse L. Simpson, J. G. Van Keuren, and
William Vicars, Members and Commissioners of
the Illinois Commerce Commission, Joseph Bibb,
Director of Department of Public Safety, and
William H. Morris, Superintendent State Police
of Illinois,

Defendants-Appellants.

Boeth, P. J.

Plaintiffs filed their complaint for a declaratory judgment declaring the individual plaintiffs to be entitled to certificates of convenience and necessity as local carriers without restrictions as to commodities or class of property to be transported by them and for injunction against defendants and their agents from arresting plaintiffs for transporting commodities not enumerated upon the certificates of convenience and necessity now held by them. Upon hearing with notice, the trial court issued a temporary injunction.

This is an appeal from an interlocutory order denying a motion to dissolve the temporary injunction.

1000

The complaint as filed alleges that individual plaintiffs were issued certificates of public convenience and necessity as "local carriers" under Section 6 (the "Grandfather" clause) of the Illinois Truck Act, effective July 25, 1939, which provides that every person operating as a carrier or whose predecessor in interest was so operating on the effective date of the Act, who prior to September 1, 1941, shall file an application for a certificate of public convenience and necessity accompanied by proof of financial responsibility and compliance with safety requirements, shall be granted a certificate without further proceedings. It then alleges that said Act did not provide that certificates issued to local carriers under the Grandfather clause shall be limited to transportation of any class or classes of property, but that the Department administering said act, issued some certificates upon forms stating that the authority granted was limited to the transportation of certain classes of property, but other certificates issued to local carriers specifically provided that such limitations did not apply to those qualifying under the Grandfather clause.

It is further alleged that because of this attempt to limit some local carriers, entitled to certificates under the Grandfather clause, to the transportation of certain designated commodities, the General Assembly amended Sec. 8 of The Illinois Truck Act, effective July 16, 1941, by adding thereto the following:

"Nothing herein contained shall be deemed to restrict any applicant hereunder, under any certificate issued to him, to the transportation of only such class or classes of property as may have been transported by him prior to the effective date of this Act. (Chap. 95¹, Sec. 247, Ill. Rev. St.)";

that subsequent to the effective date of the amendment July 16, 1941, plaintiffs and other local carriers requested the Department to amend their certificates so that no limitation as to commodities that may be transported would be indicated thereon, but the Department advised them this was unnecessary since the statute provides that no such limitation applies to certificates issued under the Grandfather clause; that after the 1941 amendment no limitation upon the class or classes of property to be transported appeared upon certificates issued to local carriers claiming grandfather rights.

It is further alleged that effective January 1, 1954, the Illinois Truck Act was superseded by The Illinois Motor Carrier of Property Act (Chap. 95¹, Sec. 232, Ill. Rev. Stat. 1957), the administration and enforcement of said act being vested in the Illinois Commerce Commission, which act designated all persons transporting property over the highways of the State for the general public by motor vehicle for hire, whether over regular, or irregular routes, as common carriers.

The complaint further alleges that Section 9 of the Illinois Motor Carrier of Property Act provides that every carrier, operating under authority issued pursuant to the Illinois Truck Act as a local carrier, shall file with the Illinois Commerce

Commission an application for a Certificate or permit and shall be granted a new certificate, authorizing such carrier to perform "the operation and service authorized pursuant to the provisions of the Illinois Truck Act"; that although said act requires the defendants to grant plaintiffs a new certificate authorizing them to perform the same operation and service authorized pursuant to the provisions of the Illinois Truck Act, the defendants have refused to do so and have limited such certificates to authorize the transportation of only such class or classes of property as specifically designated in the certificates previously issued by the Department of Public Works and Buildings; that although defendants have been advised of these facts they have refused to modify said certificates so as to conform to the authority held by plaintiffs pursuant to the Illinois Truck Act.

It is then alleged that the defendants through their servants, agents and investigators have threatened plaintiffs with and caused the arrest of some of them, for transporting property not specifically enumerated upon the certificates issued to them by defendants; that such conduct upon the part of the defendants is resulting in irreparable damage to plaintiffs and in addition thereto prevents them from rendering the service to the public contemplated by the Legislature; that shippers, chiefly farmers and small merchants, in rural communities, where the services of plaintiffs and other similarly situated are indispensable, will be irreparably damaged if they cannot have any class of property they desire transported by motor

vehicle for hire, since many of the communities are not on routes served by railroads, or trucking companies operating over fixed routes and with regular schedules; that defendants have refused to continue cases, when arrests are made, pending the determination of the issue here presented, although plaintiffs have been permitted to haul commodities of every kind and class without arrests being made or threatened for many years.

Subsequent to filing the complaint defendants filed a verified motion to dismiss the complaint, under Section 42 of the Civil Practice Act. This motion in substance set up the provision of Section 9 paragraph (b) of the Illinois Motor Carrier of Property Act as follows:

"If after hearing on complaint of any interested party, or on its own motion, it is shown that the certificate or permit issued by the Commission pursuant to the provisions of paragraph (a) of this Section does not conform to the operating rights actually exercised by the holder of such certificate or permit issued pursuant to the provisions of 'The Illinois Truck Act', approved July 25, 1939, as amended, then, the Commission shall promptly modify such certificate or permit so that it shall conform to the authority and actual use under such Act."

and alleged that although certificates were issued by the Commission during 1954 and 1955, none of the plaintiffs have ever filed a complaint under Section 9(b) stating that the certificates so issued did not conform to the operating rights held under the Illinois Truck Act and actually exercised by such carriers, with the request for a modification of the certificates so issued so that the same might conform to the authority and actual use under

the Illinois Truck Act; that accordingly plaintiffs had failed to exhaust the administrative remedies and consequently the complaint did not state a cause of action. This motion came on for hearing on March 13, 1958. On March 18, 1958, the trial judge filed a memorandum opinion, holding in effect that the complaint stated a cause of action and that the complaint alleged sufficient facts obviating the necessity of plaintiffs complying with Section 9(b). Accordingly defendants motion to dismiss was denied.

On March 31, 1958, the petition of plaintiffs for a temporary injunction, theretofore filed, came on for hearing. At the time of the hearing no answer to the complaint had been filed. All parties were represented by counsel pursuant to notice previously given, whereupon the trial court granted the petition for temporary injunction and temporarily enjoined defendants, their agents and investigators, from arresting or prosecuting plaintiffs for transporting commodities not enumerated upon certificates of convenience and necessity theretofore issued by the Illinois Commerce Commission until further order of court. On this same day, following the granting of the temporary injunction, defendants filed their verified answer.

An examination of the answer reveals that in addition to the admissions and denials of corresponding paragraphs of the complaint, it again sets up the matters previously set forth in the motion to dismiss.

On May 12, 1958, defendants filed their motion to dissolve the temporary injunction, basically on the ground that the pleadings,

namely the complaint and answer and supplements thereto, show upon their face that plaintiffs have not exhausted their administrative remedies. This motion to dissolve was denied on July 31, 1956, and this appeal is from that order.

In the recent case of Hoagland et al v. Bibb et al, 12 Ill. App. 2d 298, 139 N.E. 2d 417, we upheld the right of a trial court to issue a temporary injunction enjoining enforcement of the penalty provisions of a statute, by making arrests, pending a declaration of the rights of the parties under the statute. We there noted the case of Thillens, Inc. v. Cooper, 345 Ill. App. 145, 102 N.E. 2d 562, as likewise sustaining this principle. Such is the nature of the temporary injunction in the case at bar.

The Attorney General contends that plaintiffs, having failed to file a complaint under Section 9(b), and in event of an adverse determination by the Commission failing to pursue the remedy by way of administrative review, they have failed to exhaust their administrative remedies and are precluded from maintaining this action. This contention presumes that under a proper interpretation of the various provisions of the Illinois Motor Carrier Act and the preceding statute, The Illinois Truck Act, this was necessary, which is the ultimate issue involved in this case. This contention also overlooks the factual issue raised by the pleadings that defendants had refused to modify plaintiffs' certificates after being advised of their contentions and that complaints under Section 9(b) would be futile. It is the province of the trial court to finally make these determinations upon the

complaint and answer. If the complaint and answer present questions of fact to be resolved, this can be done on a hearing on the complaint and answer. If no issue of fact need be resolved, but the questions involved arise solely on the pleadings, then a motion for judgment on the pleadings is in order. The actual merits of this cause are not before us on this appeal and until such time as there is a final decree we could not be warranted in expressing any opinion on any questions that go strictly to the merits of this controversy.

In an application for a temporary injunction it is not required that a plaintiff make out a case that is certain to prevail on final hearing. It is sufficient if there is shown a fair question as to the existence of the rights claimed, so that a court is satisfied their present state should be preserved until final hearing and disposition. Westor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 21 N.E. 2d 722; Western Auto Supply Company v. Chelcraft, 16 Ill. App. 2d 461, 142 N.E. 2d 582. By the issuance of the temporary order, the trial court has determined the necessary elements for a temporary injunction to exist. We are of the opinion that this order should not be disturbed.

Accordingly the decree of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Reynolds and Carroll, JJ., concur.

newspaper
change made
new look
and

4/9/59

A

1

Page 2

)))))))))))))))

)
)
)
)

Appeal from
Circuit Court
Sangamon County

)
)
)
)
)
.)
)
)

1

•

Plaintiffs filed their complaint for a declaratory judgment declaring the individual plaintiffs to be entitled to certificates of convenience and necessity as local carriers without restrictions as to commodities or class of property to be transported by them and for injunction against defendants and their agents from arresting plaintiffs for transporting commodities not enumerated upon the certificates of convenience and necessity now held by them. Upon hearing with notice, the trial court issued a temporary injunction.

This is an appeal from an interlocutory order denying a

motion to dissolve the temporary injunction.

The complaint as filed alleges that individual plaintiffs were, prior to July 25, 1939, the effective date of the Illinois Truck Act, carriers of property by truck for compensation for the general public in intrastate commerce, without regular routes or fixed termini and were issued certificates of public convenience and necessity as "local carriers" under Section 6 (the "Grandfather" clause) of the Illinois Truck Act, effective July 25, 1939, which provides that every person operating as a carrier or whose predecessor in interest was so operating on the effective date of the Act, who prior to September 1, 1941, shall file an application for a certificate of public convenience and necessity accompanied by proof of financial responsibility and compliance with safety requirements, shall be granted a certificate without further proceedings. It then alleges that said Act did not provide that certificates issued to local carriers under the Grandfather clause shall be limited to transportation of any class or classes of property, but that the Department administering said act, issued some certificates upon forms stating that the authority granted was limited to the transportation of certain classes of property, but other certificates issued to local carriers specifically provided that such limitations did not apply to those qualifying under the Grandfather clause.

It is further alleged that because of this attempt to limit some local carriers, entitled to certificates under the Grandfather

clause, to the transportation of certain designated commodities, the General Assembly amended Sec. 8 of The Illinois Truck Act, effective July 16, 1941, by adding thereto the following:

"Nothing herein contained shall be deemed to restrict any applicant hereunder, under any certificate issued to him, to the transportation of only such class or classes of property as may have been transported by him prior to the effective date of this Act. (Chap. 95, Sec. 247, Ill. Rev. St.)";

that subsequent to the effective date of the amendment Jul. 16, 1941, plaintiffs and other local carriers requested the Department to amend their certificates so that no limitation as to commodities that may be transported would be indicated thereon, but the Department advised them this was unnecessary since the statute provides that no such limitation applies to certificates issued under the Grandfather clause; that after the 1941 amendment no limitation upon the class or classes of property to be transported appeared upon certificates issued to local carriers claiming grandfather rights.

It is further alleged that effective January 1, 1954, the Illinois Truck Act was superseded by the Illinois Motor Carrier of Property Act (Chap. 95, Sec. 282, Ill. Rev. Stat. 1957), the administration and enforcement of said act being vested in the Illinois Commerce Commission, which act designated all persons transporting property over the highways of the State for the general public by motor vehicle for hire, whether over regular, or irregular routes, as common carriers.

The complaint further alleges that Section 9 of the Illinois

Motor Carrier of Property Act provides that every carrier, operating under authority issued pursuant to the Illinois Truck Act as a local carrier, shall file with the Illinois Commerce Commission an application for a Certificate or permit and shall be granted a new certificate, authorizing such carrier to perform "the operation and service authorized pursuant to the provisions of the Illinois Truck Act"; that although said act requires the defendants to grant plaintiffs a new certificate authorizing them to perform the same operation and service authorized pursuant to the provisions of the Illinois Truck Act, the defendants have refused to do so and have limited such certificates to authorize the transportation of only such class or classes of property as specifically designated in the certificates previously issued by the Department of Public Works and Buildings; that although defendants have been advised of these facts they have refused to modify said certificates so as to conform to the authority held by plaintiffs pursuant to the Illinois Truck Act.

It is then alleged that the defendants through their servants, agents and investigators have threatened plaintiffs with and caused the arrest of some of them, for transporting property not specifically enumerated upon the certificates issued to them by defendants; that such conduct upon the part of the defendants is resulting in irreparable damage to plaintiffs and in addition thereto prevents them from rendering the service

to the public contemplated by the Legislature; that shippers, chiefly farmers and small merchants, in rural communities, where the services of plaintiffs and other similarly situated are indispensable, will be irreparably damaged if they cannot have any class of property they desire transported by motor vehicle for hire, since many of the communities are not on routes served by railroads, or trucking companies operating over fixed routes and with regular schedules; that defendants have refused to continue cases, when arrests are made, pending the determination of the issue here presented, although plaintiffs have been permitted to haul commodities of every kind and class without arrests being made or threatened for many years.

Subsequent to filing the complaint defendants filed a verified motion to dismiss the complaint, under Section 48 of the Civil Practice Act. This motion in substance set up the provision of Section 2 paragraph (b) of the Illinois Motor Carrier of Property Act as follows:

"If after hearing on complaint of any interested party, or on its own motion, it is shown that the certificate or permit issued by the Commission pursuant to the provisions of paragraph (a) of this Section does not conform to the operating rights actually exercised by the holder of such certificate or permit issued pursuant to the provisions of 'The Illinois Truck Act', approved July 25, 1939, as amended, then, the Commission shall promptly modify such certificate or permit so that it shall conform to the authority and actual use under such Act."

and alleged that although certificates were issued by the Commission during 1954 and 1955, none of the plaintiffs have ever

filed a complaint under Section 9(b) stating that the certificates so issued did not conform to the operating rights held under the Illinois Truck Act and actually exercised by such carriers, with the request for a nullification of the certificates so issued so that the same might conform to the authority and actual use under the Illinois Truck Act; that accordingly plaintiffs had failed to exhaust the administrative remedies and consequently the complaint did not state a cause of action. This motion came on for hearing on March 12, 1958. On March 16, 1958, the trial judge filed a memorandum opinion, holding in effect that the complaint stated a cause of action and that the complaint alleged sufficient facts obviating the necessity of plaintiffs complying with Section 9(b). Accordingly defendants motion to dismiss was denied.

On March 31, 1958, the petition of plaintiffs for a temporary injunction, theretofore filed, came on for hearing. At the time of the hearing no answer to the complaint had been filed. All parties were represented by counsel pursuant to notice previously given, whereupon the trial court granted the petition for temporary injunction and temporarily enjoined defendants, their agents and investigators, from arresting or prosecuting plaintiffs for transporting commodities not enumerated upon certificates of convenience and necessity theretofore issued by the Illinois Commerce Commission until further order of court. On this same day, following the granting of the temporary injunction, defendants filed their verified answer.

An examination of the answer reveals that in addition to the admissions and denials of corresponding paragraphs of the complaint, it again sets up the matters previously set forth in the motion to dismiss.

On May 12, 1958, defendants filed their motion to dissolve the temporary injunction, basically on the ground that the pleadings, namely the complaint and answer and supplements thereto, show upon their face that plaintiffs have not exhausted their administrative remedies. This motion to dissolve was denied on July 31, 1958, and this appeal is from that order.

In the recent case of Hoerling et al v. Bibb et al, 12 Ill. App. 2d 298, 139 N.E. 2d 417, we upheld the right of a trial court to issue a temporary injunction enjoining enforcement of the penalty provisions of a statute, by making arrests, pending a declaration of the rights of the parties under the statute. We there noted the case of Thillens, Inc. v. Cooper, 245 Ill. App. 145, 102 N.E. 2d 562, as likewise sustaining this principle. Such is the nature of the temporary injunction in the case at bar.

The Attorney General contends that plaintiffs, having failed to file a complaint under Section 9 (b), and in event of an adverse determination by the Commission failing to pursue the remedy by way of administrative review, they have failed to exhaust their administrative remedies and are precluded from maintaining this action. A number of cases are cited in support of the principle of law that a declaratory judgment action cannot be resorted to without first exhausting administrative remedies. This contention

presumes that under a proper interpretation of the various provisions of the Illinois Motor Carrier Act and the preceding statute, the Illinois Truck Act, this was necessary, which is the ultimate issue involved in this case. Declaratory judgment proceedings may be employed to determine questions as to the construction or interpretation of statutes. The act so provides. Ill. Rev. Stat. 1957, Ch. 110, Sec. 57.1. Such proceedings constitute a particularly appropriate method for the determination of controversies relating to such construction, and rights, status or other legal relations under a statute. They are proper subjects of inquiry under our declaratory judgment statute.

Basically, this ultimate issue may be succinctly stated thus: prior to 1938, plaintiffs were truckers in intrastate commerce without regular routes or fixed termini transporting any and all classes of property without limitation of commodities or classes of property being transported. In 1938 the Illinois Truck Act became effective. Under the provisions of this act, Section 6 (the "Grandfather" clause), plaintiffs became entitled upon application and without further hearing, to certificates of public convenience and necessity as "local carriers". They made the application and were issued the certificates by the department administering the act. Some of these certificates limited transportation of only certain classes of property, while other certificates were without limitation. Then, in 1941 the legislature amended the Illinois Truck Act to provide in substance, that as to persons transporting property of all kinds and without limitation

prior to 1939, who were issued certificates of convenience and necessity under the Grandfather clause, no limitation as to kinds or classes of property to be transported should be imposed in the certificates. In those instances where limitations in the certificates had been imposed between 1939 and 1941, the holders of such certificates requested the amending of their certificates by the department so that no limitation as to commodities to be transported could be indicated thereon. The department advised that this was unnecessary, apparently on the theory that, to the extent that was directed to be done was to be considered as done. Then in 1954 the Illinois Motor Carrier of Property Act became effective with the Illinois Commerce Commission being designated as the enforcing agency. Pursuant to this act plaintiffs applied for and received certificates of convenience and necessity. However, plaintiffs appear to be within that class of truckers who received certificates under the grandfather clause of the Illinois Truck Act between 1939 and 1941, where the certificates contained certain limitations as to the classes of property to be transported. The new certificates issued by the Illinois Commerce Commission contained like limitations without the Illinois Commerce Commission taking into consideration the fact that such limitations were not valid in the light of the 1941 amendment even though no correction had been made in the certificates between 1941 and 1954. The basic question therefore is, whether plaintiffs were automatically upon application for new certificates under the Illinois Motor Carrier of Property Act entitled to certificates authorizing the

transportation of any and all classes of property without limitation, as they were entitled to under the Illinois Truck Act as amended in 1941 even though those certificates issued under the Illinois Truck Act contained limitations, or whether the Illinois Commerce Commission in issuing new certificates may impose the restrictions as they appear in the old certificates, or otherwise, and then require plaintiffs to proceed under Section 9(b) of the Illinois Motor Carrier of Property Act. The resolving of this question involves a construction and interpretation of the acts involved. It is the province of the trial court to finally make these determinations upon the pleadings and answer. The actual merits of this cause are not before us on this appeal and until such time as there is a final decree we would not be warranted in expressing any opinion on any questions that go strictly to the merits of this controversy.

In an application for a temporary injunction it is not required that a plaintiff make out a case that is certain to prevail on final hearing. It is sufficient if there is shown a fair question as to the existence of the rights claimed, so that a court is satisfied their present state should be preserved until final hearing and disposition. Easton Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 21 N.E. 2d 723; Western Auto Supply Company v. Chalcraft, 16 Ill. App. 2d 462, 142 N.E. 2d 502. By the issuance of the temporary order, the trial court has determined the necessary elements for a temporary injunction to exist. We are of the

opinion that this order should not be disturbed.

Accordingly the decree of the District Court of Jackson County is affirmed.

Affirmed.

By Hollis, J., and Carroll, J., concur.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Term, 1958.

CLEMENT JOSEPH, Administrator of
the Estate of THERESA ANN
JOSEPH, Deceased,

Plaintiff-Appellant,

vs.

WILLARD MAUFMAN, FRANCIS SHORT,
R.A. LYNCH and W.H. NICHOLS, a
Partnership, doing business as
NICHOLS AUTO ELECTRIC SERVICE,

Defendants-Appellees.

Appeal from the
Circuit Court of
Peoria County.

PER CURIAM:

Between twelve and one o'clock on the afternoon of December 14, 1955, Theresa Ann Joseph, while crossing Moss Avenue in the City of Peoria was struck and killed by a car owned by Francis Short and driven by Willard Mauerman. To recover for her alleged wrongful death this action was brought by the administrator of her estate.

In addition to Short and Mauerman the complaint made R.A. Lynch and W.H. Nichols, partners doing business as Nichols Auto Electric Service, parties defendant. Prior to the trial defendant, Lynch died and Hazel Lynch, his administrator was substituted as a party defendant. The issues made by the pleadings were submitted to a jury resulting in a verdict of not

guilty as to defendants, Lynch, Nichols and Mauerman. No verdict was returned as to defendant Short. The trial court rendered final judgment in favor of all defendants in bar of the action and this appeal follows.

It is insisted by counsel for appellant (1) that the verdict and judgment are against the manifest weight of the evidence; (2) that the conduct of counsel representing defendant Willard Mauerman was prejudicial and (3) that the trial court erred in giving instructions requested and tendered by the several defendants.

The record discloses that the decedent was twelve years of age at the time of the accident; she was a normal, healthy school girl and was in the seventh or eighth grade of St. Mark's Parochial School. Upon the day in question she and six schoolmates had had their noon lunch at the home of Sidney Cain, whose daughter, Shellah, was a classmate of decedent and at the time of the accident the girls were on their way back to school and were crossing Moss Avenue not at a street intersection or crosswalk but in the middle of the block. The Cain home was located on the south side of Moss Avenue, which is a level, straight, thirty foot wide, paved highway running in an easterly and westerly direction in a residential area in the City of Peoria. St. Mark's Parochial School is located north and west of the Cain home, some two blocks from the intersection of McArthur highway and Moss Avenue. McArthur highway runs in a northerly and southerly direction and is the first street west of the Cain residence and intersects Moss Avenue approximately two hundred feet west of the place where the accident occurred. At that intersection

are the customary electrically controlled red and green, stop and go lights.

Willard Mauerman, at the time of the occurrence was a high school student sixteen years of age. He was employed part time at a filling station located at the corner of University and Western Avenues. At noon, on the day of the accident, Mauerman was at the filling station and at the request of Francis Short, whose car was at the Nichols Auto Electric Service shop undergoing repairs, Mauerman accompanied Short to that repair shop. Upon arrival there, Short and Mauerman waited some thirty minutes while Mr. Nichols completed his repairs on the Short car which was later involved in this accident. Mr. Short left the repair shop driving the car he had driven from the filling station to the repair shop and immediately thereafter Mauerman left in Short's car, intending to return to the filling station. No one was with him and after he had proceeded a distance of some twenty-two blocks he turned into Moss Avenue, crossed the intersection of Garfield Avenue and was proceeding westerly on Moss Avenue at a speed of between fifteen and twenty-five miles per hour.

The defendant, Mauerman testified that the car he was driving was an Oldsmobile '98 with Dyna flow transmission in good mechanical condition and that he knew it was equipped with a powerful motor, capable of attaining a high speed quickly. He stated that the brakes operated efficiently, and that he never felt or suspected that there was anything wrong with the car until after he had crossed the Garfield Avenue intersection; that he had driven on Moss Avenue prior to this time and knew

it was a closely built up neighborhood and had previously observed children travelling back and forth when school was in recess.

Mr. Mauerman further testified that shortly after crossing the Garfield Avenue intersection he noticed a car in front of him proceeding in the same direction and he increased his speed to about twenty-five miles per hour in order to pass. As abstracted this witness continued, "I pushed the accelerator down to the floor board as far as it would go. I pushed it down to a point that caused the car, in my estimation, to go 70 miles an hour. I got the accelerator down but couldn't get it back up and that was what I was trying to do, pull it up. When the accelerator first stuck I was looking ahead. I put my foot on the brakes and tried to use my other foot to free the gas pedal. At that time the car ahead of me was gaining speed. I went around her. I don't know how fast I was going when I went around her. When I first realized it was stuck, I was going about 25. I turned to go around the car ahead of me. I then bent over to try to pull up the gas pedal. I don't know where my car was with reference to McArthur when I bent over. I knew I was then west of Garfield. As my accelerator stuck I did not observe anybody ahead of me in addition to this car. I didn't feel anything. I tried to free the gas pedal with my hand. I pulled on the accelerator rod that comes through the floor. It would not pull. The car was going down the street and I had my foot on the brake. The car was speeding up. It was running fast.

"The foot accelerator was the only method that controlled the speed. At that time I knew where the intersection of McArthur and Moss was and was aware I was moving toward it on Moss. I

knew there was a red and green stop light at McArthur and Moss. Moss Avenue, between Garfield and McArthur, is straight and level. It is about 700 feet from Garfield to McArthur on Moss. Moss avenue is about 30 feet wide and equipped with curbs on either side and paved with black top. My eye sight was good and I could see through the windshield. The car I was driving was all right. I was all right physically and mentally and did not faint or anything. I knew I was on Moss Avenue but did not know exactly my whereabouts on the street. Nothing happened to me physically or mentally. I did not know where I was because I was bent over trying to free the gas pedal. I haven't any knowledge at all of striking the girl. I did not see the girl. I heard an impact on the car but I didn't see it. I was bent down trying to free the gas pedal. As my car was moving forward I was looking down at the floor board. You might say I was driving blind. I drove blind from the time the gas pedal stuck until I hit the tree. I bent down to free the gas pedal and I was still looking down when I hit the tree. I was about 100 feet from Garfield and I would say I was still east of McArthur 600 feet when I bent down. Perhaps it was closer to 400 or 500 feet."

In answer to his attorney's question: "Then you did drive about 700 feet blind altogether?" Mauerman replied: "Yes sir, on Moss Avenue." This witness then continued: "The ignition key was in the ignition lock while I was doing that, and I had my foot on the brake pedal that was on the floor of the car and while I was driving blind in that way for that

distance the lever with which I could change the speeds was there. I had leaned down to pull up the accelerator."

The car which Mauerman testified was proceeding in the same direction he was and which he noticed in front of him after he crossed the Garfield Street intersection was being driven by Miss. Karen Kinkade. Miss Kinkade testified that when she first noticed the Mauerman car it was behind her and this was before she turned left and entered Moss Avenue; that she proceeded in a westerly direction on Moss Avenue and was going 20 to 25 miles per hour when Mauerman passed her on the left and at that time she formed no opinion as to the speed of the Mauerman car but stated that as it passed her it picked up speed and that Mauerman was leaning forward and looking down. She further testified that as the Mauerman car passed her front fender "it took on a very sudden burst of speed and kinda jumped or something and at that time it was about four car lengths from the girls who were crossing the street." She further testified that after the car passed her it angled very sharply toward the right curb and hit Theresa when she was about one step from the north curb; that the Mauerman car then veered suddenly to the left and continued down the street across the McArthur intersection and on West until it ran into a tree.

Thomas Mariner, testified that he was driving a half-ton pickup truck on Moss Avenue, proceeding in an easterly direction at 10 miles per hour at the time of the occurrence; that when he was about 45 feet east of the McArthur intersection he observed the group of girls crossing Moss Avenue; that they

were grouped together and going diagonally in a northwesterly direction and when he first saw them they were about twelve feet from the north curb; that when he first noticed the Mauerman car it was about fifty feet from the girls and traveling in an easterly direction in the center of the street going 35 miles per hour. According to this witness the speed of the Mauerman car increased as it proceeded west and when it "got to me it zoomed ahead like all the power in the world was pushing it" and struck decedent and continued across McArthur Highway "with ever increasing speed". In the opinion of this witness the Mauerman car was going between 55 to 60 miles per hour as it crossed the McArthur Highway intersection.

Other evidence in the record is to the effect that at this time the Mauerman car was going between 50 and 65 miles per hour and Frank Coates, a police officer, who arrived at the scene shortly after the accident testified that at that time Mauerman told him the speed he was travelling was between 65 and 70 miles per hour. This witness further testified that Mauerman told him that his accelerator had stuck and that he, Coates, examined the car at that time and found that the foot accelerator was disconnected from the throttle rod.

William Nichols testified that he drove the car involved in this accident into the repair stall at his repair shop about nine o'clock on the morning of the occurrence and that the accelerator functioned properly; that the work he did on the car that morning consisted of adjusting the carburetor, removing the distributor, synchronizing the points and replacing the distributor on the engine and that when the car left his repair shop the motor appeared to be in good condition and he felt there was nothing wrong with the car. The evidence is further

that just after the accident an examination of the car disclosed that a connecting link from the throttle to the accelerator had fallen, the pump rod had come loose and the throttle was in a wide open position.

Counsel for appellant state that the material facts in connection with the death of plaintiff's intestate are undisputed and insist that the trial court erred in not sustaining appellant's post-trial motion for judgment notwithstanding the verdict and directing that the cause be re-submitted to another jury on the sole question of plaintiff's damages. In the alternative counsel insist that plaintiff's motion for a new trial should be granted for three reasons: (1) prejudicial conduct of Maerman's counsel in the presence of the jury; (2) the verdict and judgment are against the manifest weight of the evidence; and (3) that the trial court erred in giving certain instructions requested by defendants.

Counsel for appellees insist that the evidence discloses that after Maerman entered Moss Avenue he was proceeding in a westerly direction at a reasonable rate of speed and when he increased his speed his accelerator stuck and without any negligence on his part he was then confronted with sudden and imminent danger and under the circumstances which faced him at that time the jury were warranted in finding that he acted in a reasonable manner and that its verdict is sustained by the evidence; that no prejudicial instructions were given and there is no merit in appellant's criticism of the conduct of appellee's counsel.

The record discloses that at the time the case was called for trial the court appointed one of the members of the firm of attorneys representing the defendants, Mauerman and Short, guardian ad litem for defendant Mauerman and just before the jurors entered the jury box for examination counsel for plaintiff made an oral motion that the parents of Mauerman be required to change their position in the court room. Counsel stated that they were sitting inside the bar and near the defendant, Mauerman, and that it would appeal to the sympathy of the jury and prejudice the plaintiff to permit them to remain there. To this objection the guardian ad litem stated that he wanted to ask the parents whether certain jurors would be acceptable and confer with them about the selection of the jury and that after the jury was selected the parents would not be permitted to sit on the front row of seats. The court stated to counsel that they should not make any reference to either parent but that the parents would be permitted to sit in the front row "where they are now sitting, the seats now occupied by them being not at the counsel table".

The following morning, the selection of the jury not having been completed, counsel for plaintiff asked the court to require the mother of the plaintiff to sit in the space designated for spectators, and to this request the court stated: "I do not believe we should change the seating position of the parents and place them among prospective jurors who have not been called in the box. The matter was gone into yesterday and it was ruled the parents might remain where they were until the jury was selected." After the jury was selected the parents of the minor defendant had seats in another part of the courtroom.

The foregoing is all that the record discloses in connection with counsel's insistence that plaintiff was prejudiced by the conduct of Mauerman's attorney. Appellant argues that defendant's counsel had no other motive in arranging for the parents of Mauerman to sit where they did except "to impress the jury that Mauerman was of tender years to such an extent that he required the solicitude of his mother and father and make it hard for the jury to bring in a verdict against him." We are not impressed with this argument. The parents of defendant had a right to be in the court room and present during the trial and counsel had a perfect right to confer with them. It appears that they were not at the counsel table and the record does not disclose any objectionable conduct either by the parents or by the guardian ad litem during the examination of the jury or after its selection. There is no merit in this contention of appellant. It does not appear that plaintiff was in any way prejudiced by the court's ruling.

It is next insisted that the court erred in giving instructions tendered by the defendants, Mauerman and Short. At the conclusion of the evidence the court held a conference with the attorneys to settle the instructions as provided in the Practice Act (Ill. Rev. St. 1957, Chap. 110, sec. 67 - sub-paragraph (3)). The conference was held outside the presence of the jury but other than that fact, all that the record discloses is this statement of the court: "Mauerman and Short's tendered instructions 9, 10, 11, 12, 15, 19, 20 and 21 given over objection by plaintiff. It appears no objection to any other given instruction". What occurred at this conference on instructions is not revealed by the abstract or by the record. What objection was made by counsel or what reasons were suggested to the court why any tendered instruction should not

be given does not appear from this record.

In the recent case of *Onderisin v. E.J. and E. Ry. Co.* 20 Ill. App. 2d, 73 this court, in speaking of the conference of the court with counsel for the respective parties to settle instructions under Section 67 sub-paragraph (3) of the Civil Practice Act said: (pp. 77-78) "The purpose of the conference is to afford counsel an opportunity to object to or correct erroneous instructions. As officers of the court, counsel have a duty to cooperate with the trial judge to the end that the jury may be properly instructed. Enlightened trial practice does not permit counsel, under the guise of trial strategy, to sit idly by and permit instructions to be given the jury without specific objection and then be given the advantage of predicated error thereon by urging the error for the first time in a post trial motion." In the instant case the record is such that counsel for appellant are precluded from urging in this court that any of the several instructions of which they now complain are erroneous. (*Arboit v. Gateway Transportation Co.*, 15 Ill. App. 2d, 500, 512; *Tabor v. Tazewell Service Co.*, 18 Ill. App. 2d 593; and *Onderisin v. Elgin, Joliet and Eastern Railway Co.*, 20 Ill. App. 2d 73.)

We have read this record with care and have set forth quite fully a fair resume of the evidence. Upon the occasion in question Willard Mauerman, was driving the Short car as Short's agent and with his permission on Moss Avenue in a closely built up residential part of Peoria. Mauerman was familiar with this street, knew it intersected McArthur Avenue and that there were the customary traffic signals there. He knew that there was a school near by and knew his speed was limited to 25 miles per hour.

be given does not appear from this record.

The recent case of *Onderisin v. Elgin, Joliet and Eastern Railway Company*, No. 11205 (in which an opinion was recently filed but as yet has not been reported) this court in speaking of the conference of the court with counsel for the respective parties to settle instructions under Section 67 sub-paragraph (3) of the Civil Practice Act said: "The purpose of the conference is to afford counsel an opportunity to object to or correct erroneous instructions. As officers of the court, counsel have a duty to cooperate with the trial judge to the end that the jury may be properly instructed. Enlightened trial practice does not permit counsel, under the guise of trial strategy, to sit idly by and permit instructions to be given the jury without specific objection and then be given the advantage of predicated error thereon by urging the error for the first time in a post trial motion."

In the instant case the record is such that counsel for appellant are precluded from urging in this court that any of the several instructions of which they now complain are erroneous. (*Arboit v. Gateway Transportation Co.*, 15 Ill. App. 2d. 500, 512; *Tabor v. Tazewell Service Co.*, 18 Ill. App. 2d 593 and cases therein cited).

Notwithstanding the fact that no specific objection was made by counsel for appellant at the conference on instructions held by the court we have, of course, read and considered them in connection with all the evidence found in this record and we are unable to escape the conclusion that the plaintiff is entitled to have the issues made by the pleadings in this case submitted to another jury. Accordingly, the judgment of the Circuit Court of Peoria County is reversed and this cause remanded to that Court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED

Chicago

In order to pass the Kinkade car which was in front of him and which was proceeding at the legal rate of speed in the same direction, he voluntarily pressed the accelerator of the car he was driving not part way or gradually but as far as it would go and until stopped by its contact with the floor-board. As he passed the Kinkade car he was approximately four car lengths from decedent. According to the testimony of Karen Kinkade he was bending forward and looking down. His accelerator had stuck. In a matter of seconds his speed was increased to 65 or 70 miles per hour. The lever by which he could place the engine in neutral and also the ignition switch were within easy reach. The brakes on his car were in good condition and there was nothing wrong with the steering wheel or mechanism of the car. Had he looked when he passed the Kinkade car or at any time before the car he was driving struck decedent he would have observed her and her companions and the accident could have been avoided. Regardless of the danger to himself and others he voluntarily placed himself in a position where he could not see and drove blindly for a distance of approximately 700 feet. From these and other facts found in this record appearing from the testimony of Thomas Mariner, Karen Kinkade and Mauerman himself we cannot escape the conclusion that as to defendants, Mauerman and Short, an opposite finding from that reached by the jury is indicated and as to these defendants the issues made by the pleadings should be submitted to another jury.

As to the case against defendants, W.H. Nichols and Hazel Lynch, administrator of the Estate of R.A. Lynch, deceased, counsel for appellant state that there is little, if any, evidence of an impressive nature tending to show any negligence on the part

of defendant Nichols and his deceased partner, Lynch, in making the repairs on Short's car on the morning of the accident. We agree with this statement and with the conclusion arrived at by the jury as to these defendants and as to them the judgment is affirmed.

Judgment affirmed as to defendants W.H. Nichols and Hazel Lynch, administrator of the Estate of R.A. Lynch, deceased

Judgment reversed and cause remanded for a new trial as to defendants, Willard Mauerman and Francis Short.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
February Term, A.D., 1959

20

THE CITY OF FREEPORT, ILLINOIS,)	
a Municipal Corporation,)	
)	
Plaintiff-Appellant,)	Appeal from the
)	
vs.)	Circuit Court of
)	
EVA BAUCH and FERD BAUCH,)	Stephenson County,
)	
Defendants,)	Illinois.
)	
FERD BAUCH,)	
)	
Defendant-Appellee.)	

DOVE, J.

On February 19, 1958, the City of Freeport filed its unverified, one count, complaint in the Circuit Court of Stephenson County demanding judgment against Eva Bauch and Ferd Bauch in the sum of \$1,050.45 and praying that this sum be decreed a lien against certain described real estate known as Bauch's addition to the City of Freeport.

The complaint also prayed that a receiver be appointed to sell said premises in order to satisfy said amount, together with interest and costs, and in the event of said sale and a failure to redeem therefrom as provided by law, that all persons claiming through or under the defendants be

barred and foreclosed of all right or equity of redemption and in case the sale does not produce enough to pay plaintiff's claim that the plaintiff be awarded a money decree against the defendants.

Upon the filing of the complaint a summons was issued and duly served on both defendants on February 19, 1958 and on March 14, 1958, Eva Bauch appeared by attorney and filed her answer to said complaint and also filed a counter-claim. Ferd Bauch made no appearance and on April 7, 1958, the plaintiff filed its unverified motion for an order defaulting Ferd Bauch and for a money judgment against this defendant for \$1,080.48 and costs. This motion, without notice to anyone, was heard and the court entered an order, which, after finding Ferd Bauch in default made this recitation: "Evidence having been presented to the court as to plaintiff's cause of action and as to the amount thereof and the court being fully advised in the premises finds that the plaintiff's damages against defendant, Ferd Bauch, are in the sum of \$1,080.48. It is, therefore, ordered, adjudged and decreed that judgment by default be, and the same is hereby entered, in favor of the plaintiff and against the defendant, Ferd Bauch, in the sum of \$1,080.48 and costs and that the cause proceed against the remaining defendant, Eva Bauch."

On May 29, 1958, an execution was issued upon this judgment and on June 11, 1958, this execution was duly served on Ferd Bauch. On June 18, 1958, Ferd Bauch filed his petition praying that the judgment and default against him be set aside and vacated and he be granted leave to answer the complaint.

This petition was verified by Ferd Bauch and by the attorney representing Eva Bauch. On June 20, 1958, plaintiff filed its motion to strike this petition and upon a hearing had that day an order was entered denying plaintiff's motion to strike, quashing the execution, vacating the judgment entered April 7, 1958, and granting defendant, Ferd Bauch, twenty days in which to answer the complaint. To reverse this order the City appeals.

Counsel for appellee, in order to sustain the order appealed from, insists that the complaint failed to state a cause of action against appellee; that the instant proceeding is an equitable suit to establish and foreclose a lien against two defendants jointly and under the averments of the complaint, inasmuch as one defendant had answered, it was error for the chancellor to render a money judgment against the remaining defendant until the issues made by the complaint and answer of appellee's co-defendant were heard. It is also insisted that default judgments are not favored by the courts and that the chancellor did not abuse his discretion in vacating such judgment.

The complaint in this case alleged, among other things, that Eva Bauch was the owner in fee simple of certain described real estate which had been platted and known as Bauch's Addition to the City of Freeport; that Ferd Bauch is the husband of Eva Bauch and claims some interest in said real estate as agent for, or in joint venture with, or as equitable owner thereof, the exact nature of which is unknown to plaintiff; that the defendants presented to the plaintiff a plat of said subdivision for approval and acceptance on August 16, 1954; that on October

4, 1954, while said matter was pending the defendants, by Eva Baugh, made, executed and delivered a certain agreement, a copy of which was attached to and made a part of the complaint. This exhibit is as follows, viz.:

"October 4, 1954. To the City of Freeport, Freeport, Illinois, Gentlemen: This is my written assurance that within a reasonable time after acceptance of the plat of Baugh's Second Addition, City water mains installed, and a permit issued for a main sewer connection, I will perform following in regard to said Addition:

1. Easement has been widened from 20 to 25 feet.
2. I agree to install storm sewer on low part of Logan Street.
3. I agree to install intake on storm sewer existing on Stover.
4. Mr. Biveley has drawn blue prints with grades that will exist after the streets are graveled.
5. Mr. Biveley has drawn blueprints and charts showing the sewer V'S now in existence.
6. There is now 100 feet turnaround instead of 60 foot dead end at Stover Street.
7. A new plat has been drawn showing 16 lots instead of former plat of 10 lots. Block 1 Lot 10 will be divided into lots as sold, buyer to fix size with 50 feet minimum.
8. The new plat shows curbs 31 feet apart from the back of each curb to the back of each curb.
9. I will supply gravel and curb for the dedicated streets as follows: as explained to Mr. O'Malley, City Engineer, 1st etc --- a strip approximately 2 feet wide and 6" deep in center of dedicated streets will be graveled in 1954, the 2nd---balance will be done in 1955 and after a reasonable time the city has agreed to exercise their present street policy and supply hard top.
10. I have a letter from a reputable manufacturer that the manner used in installing joints is satisfactory.

Owner (Eva 2) Eva Baugh."

The complaint then alleged that on October 4, 1954, the plaintiff approved and accepted said plat and performed the terms and conditions of Exhibit A on its part to be performed, all of which was done in reliance on and pursuant to

the covenants and agreements and promises and conditions made and to be performed by the defendants. It was then alleged that the defendants willfully failed, neglected and refused to perform their obligations as set forth in said paragraph 9 although requested so to do by the plaintiff and as a result thereof the plaintiff was required to do so extending therefor \$1,000.48, which amount is more particularly itemized in a statement attached to and made a part of the complaint as Exhibit B. This exhibit is as follows:

City of Freeport, Office of City Engineer,
Freeport, Illinois, October 17, 1957. To Eva
Bauch and Fred Bauch, 1130 N. Laver, Freeport,
Illinois.

"Bauch Addition--Streets

<u>Labor</u>			
35 hours		\$1.55	\$54.25
30 hours		1.85	55.50
Grader	26 1/2 hours	5.30	212.30
Truck #3	22 1/2 hours	5.00	112.50
Truck #4	25 hours	5.00	125.00
Truck #5	7 hours	5.00	35.00
Endloader	2 hours	5.00	10.00
Crushed rock,			
270 yards		1.40	378.00
			<u>982.25</u>
	10% Administration fee		98.23
			<u>1080.48</u>

The complaint concluded that plaintiff had no adequate remedy at law; that there was due the plaintiff from the defendants \$1,080.48 and costs which amount should be decreed to be a lien against said real estate. The complaint prayed that a receiver be appointed and in case of non-payment of the amount found due plaintiff that the real estate described in the complaint be sold and upon a failure to redeem from said sale that all persons claiming through or under the defendants be barred and foreclosed of all right of redemption.

The default of appellee admitted every well pleaded traversable fact alleged in the complaint. It did not admit anything not alleged nor did it admit any conclusions of the pleader or that the complaint contained sufficient allegations to state a cause of action against the defaulting defendant.

Title Judgments
(23 I.L.P./sect's 54-59).

The instant complaint did charge and the default of appellee admitted that Eva Bauch was the owner of the described real estate which was known as Bauch's addition to Freeport; that a police had an interest therein but the nature thereof was unknown to plaintiff; that both defendants, on August 18, 1934 presented a plat of said addition to the plaintiff for acceptance; that on October 1, 1934 plaintiff accepted said plat at a local time which required an instrument by which she, obligated herself to pay certain things one of which was the payment of an undetained amount of gravel and curbing for the dedicated streets of the addition; that defendants were to perform the obligations undertaken by Eva Bauch and that plaintiff did so and expended therefor \$962.25 and charged defendants with an additional administration fee of \$98.23 making a total of \$1060.48.

The complaint sought no money judgment against appellee alone but its purpose was to have the amount it sought to recover from both defendants declared a lien upon the real estate constituting the addition and upon the failure of the defendants to pay the amount found due that said real estate be ordered sold as in foreclosure proceedings. The complaint avers the liability of appellee jointly with Eva Bauch, the other defendant and it was this joint liability and not a separate liability which appellee admitted by his default.

By her answer, defendant, Eva Bauch, admitted she was the owner of the real estate described in the complaint and known as Bauch's Addition, denied that appellee had any interest therein other than his inchoate dower as her husband, admitted her execution of Exhibit A and averred she had fully complied with all its terms and denied that any sum was due plaintiff. By her counterclaim she alleged she had expended \$1,527.40 in the construction of a sewer in the addition and sought to recover from plaintiff \$763. 00.

The petition filed by appellee on June 13, 1958 to vacate the default judgment against him admitted he was served with process on February 19, 1958, averred that he was not a party to Exhibit A, upon which plaintiff's suit is based, that he had no interest in the premises described as Bauch's addition to Freeport except an inchoate right of dower as spouse of Eva Bauch and concluded that these facts were unknown to the court at the time the order of default and judgment was entered.

An affidavit of appellee and James M. Thorpe was filed in support of this petition which recited that Thorpe and Laurence Smith are attorneys and represent Mr. and Mrs. Bauch in this proceeding; that Thorpe is a brother of Mrs. Bauch and immediately after defendants were served with process on February 19, 1958 they consulted with Thorpe and engaged him to represent them and defend this cause in their behalf; that Thorpe prepared an answer and counterclaim on behalf of his sister but "by inadvertence failed to enter the defendant, Ferd Bauch's appearance and did not prepare or file a separate answer in behalf of Ferd Bauch; that such failure did not come to his

attention or to the attention of Ferd Bauch until about June 1, 1958 when they both learned that a judgment by default had been entered against Ferd Bauch." This affidavit also recites that appellee was not the owner of the real estate described in the complaint and refers to the allegations of the answer and counterclaim of Eva Bauch which disclose that both defendants have a good, meritorious and provable defense to plaintiff's action. The motion of appellant to strike appellee's petition to vacate the default judgment stated that appellee's petition to vacate was filed more than thirty days after the judgment was rendered and that it appeared from the record that appellee was guilty of laches.

The applicable section of the Practice Act provides that relief from final orders, judgments and decrees after 30 days from the entry thereof, may be had upon petition. This section abolishes certain common law writs and bills of review and provides that all relief heretofore obtainable and the grounds for relief heretofore available, either at law or in equity, shall be available by petition and that there should be no distinction among actions at law, suits in equity or other proceedings, statutory or otherwise as to availability of relief, grounds for relief or the relief obtainable. (Ill. Rev. St. 1957, Chap. 110, sec. 72).

In *Ellman v. De Ruiter*, 412 Ill. 255 it appeared that a summons was issued on October 25, 1950 and duly served on the defendant on October 31, 1950. The following day the defendant took the summons to a firm of lawyers and a docket clerk employed by the firm erroneously recorded the summons as having been

served on November 1, 1950 instead of October 31, 1950. On November 24 defendant was defaulted and judgments were rendered against him. On December 4, 1951 defendant's attorney entered the appearance of the defendant and on his behalf filed a motion to dismiss not knowing that a default had been entered ten days previously. On January 4, 1951 counsel for defendant learned of this default by telephone from counsel for the plaintiff. A few days thereafter defendant filed his motion to vacate the judgments which motion was heard and allowed. On appeal, the appellate court, reversed the judgments of the trial court. The appellate court found that plaintiff in no way contributed to the error of the docket clerk employed by defendant's attorneys and held that the failure of counsel for plaintiff to advise the trial court that plaintiff was negotiating with defendant for a settlement at the time the default was entered was not grounds for vacating the judgments.

Upon a further appeal to the Supreme Court, that court reversed the judgment of the Appellate Court. In the course of its opinion the Supreme Court, referring to the motion under the then Section 72 of the Practice Act said: (p. 292) "It is our belief that the motion may, under our present practice, be addressed to the equitable powers of the court, when the exercise of such power is necessary to prevent injustice". The court then continued: (p. 293) "The pattern of conduct followed by plaintiff's attorney after the default judgments were entered, and for which no justification has been offered in this or the lower courts, admits of no serious doubt that it was designed to mislead and lull the defendant until such time as the county court's power over the proceeding had ceased to exist at

expiration of thirty days. While there was no duty on the attorney to notify defendant of the default judgments, fair dealing would require that he inform defendant of the defaults when the question arose instead of pursuing a course calculated to keep the defendant in ignorance until the time he could make a direct attack on the judgments had expired".

So in the instant case, there was no legal duty resting upon counsel for the plaintiff to notify counsel representing appellee's co-defendant of the fact that plaintiff had obtained a default and judgment against appellee but, under the circumstances disclosed by this record, we believe it was inequitable for counsel to remain silent and inactive until the time had expired during which appellee could make a direct attack on the judgment rendered against him.

The only issue before us is whether or not the trial court was justified upon any basis appearing in the record in entering the order from which this appeal is taken (Rosster v. Wolf, 14 Ill. App. 2d, 322, 326) In Lichter v. Scher, 11 Ill. App. 2d 441, 444 it was said that in a case in which a default has been entered and there has been no trial on the merits, the judgment itself is based on the technique of procedure and is subject to careful scrutiny.

Under all facts and circumstances appearing in this record we feel that the trial court properly exercised the equitable powers of the court in vacating the judgment against appellee and permitting appellee to appear and defend. The order appealed from is therefore affirmed.

Spivey, P.J. concurs.
McNeal, J. concurs.

Order affirmed.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
February Term, A.D. 1959

THE WHITAKER PAPER COMPANY,
an Illinois corporation,

Plaintiff-Appellant,

vs.

STANLEY SCHRAG, d/b/a PERIODICAL
LETTERPRESS CO., LINE-REMEDI-
PRINTING COMPANY, INC., an Ill-
inois corporation, ATWOOD
VACUUM MACHINE COMPANY, a corp-
oration, JOSEPH BEHR & SONS, INC.,
an Illinois corporation, and
LEONARD A. FRIBERG, Sheriff of
Winnebago County,

Defendants-Appellees.

2d
Appeal from
Circuit Court,
Winnebago County.

DOVE, J.

On September 30, 1957, Stanley Schrag, doing business as Periodical Letterpress Co., executed his promissory note to the Whitaker Paper Company, plaintiff herein, in the sum of \$19,739.27, in consideration of a prior indebtedness to the plaintiff, and, at the same time, to secure this note, he executed a chattel mortgage covering all of the machinery, tools, equipment and supplies used by him in the operation of his printing business at 2500 North Main Street, in Rockford, Illinois. This chattel mortgage was thereafter on October 4, 1957 duly recorded in the recorder's office of Winnebago County.

The note provided that certain monthly payments of principal and interest were to be made on the note.

On January 3, 1958, Lind-Rensen Printing Company, Inc., a defendant herein, attached certain property of Schrag covered by the chattel mortgage and thereafter, on March 14, 1958, obtained a judgment against Schrag for \$4352.01 and costs. Atwood Vacuum Machine Company, another defendant, filed a distress for rent action against Schrag on January 6, 1958, and obtained judgment against him for \$1504.80 and costs on February 21, 1958. Another defendant, Joseph Lehr & Sons, Inc., obtained a judgment by confession against Schrag on January 3, 1958, for \$2430.02 and costs.

Schrag defaulted in the payment of the principal and interest due on his note to plaintiff, and by reason of these defaults and the foregoing judgments obtained against Schrag, plaintiff elected to declare the unpaid principal due as provided in the mortgage and on February 13, 1958 filed the instant complaint to foreclose its chattel mortgage. All of the foregoing parties were made defendants. The Atwood Vacuum Machine Company and the Lind-Rensen Printing Company filed answers and the Machine Company filed its counterclaim. The other defendants, except Schrag appeared but did not answer. Schrag defaulted. The issues made by the pleadings were heard by the court resulting in a decree of foreclosure and sale. This decree found that Schrag was indebted to the plaintiff in the sum of \$17,081.91 plus \$500.00 attorney fees and directed that the property covered by the chattel mortgage be sold and the proceeds brought into court for disposition.

In accordance with the provisions of this decree the property covered by the mortgage was sold for \$3,100.00. Thereafter the court determined the rights of the parties in the proceeds of the sale and entered its final order on August 29, 1958, finding that the chattel mortgage which Schrag gave to the plaintiff rendered him insolvent and that such fact was sufficient, in itself, to make the chattel mortgage fraudulent as to the creditors existing on the date of its execution (September 30, 1957), even though the chattel mortgage was given to secure a valid and subsisting prior indebtedness by the mortgagor to the plaintiff.

This order then recited that the "chattel mortgage, being fraudulent as to existing creditors, does not constitute a prior lien on the proceeds derived from the sale of the mortgaged property and said mortgagee, plaintiff herein, should be required to participate pro-rata with the other creditors, Lind-Remsen Printing Company, Inc., Joseph Behr and Sons, Inc., and Atwood Vacuum Machine Company in distribution of the proceeds remaining after the payment of sums due for rent, receiver's fees and expenses".

This decree, after ordering the payment for storage to the Atwood Vacuum Machine Company and the receiver's fees and expenses, directed distribution as follows: To plaintiff, \$1,460.76 being 67.9% of the fund. To Lind-Remsen Printing Company \$363.58 being 16.9% of the fund. To Joseph Behr and Sons, Inc. \$202.23 being 9.4% of the fund. To Atwood Vacuum Machine Company, \$124.78, being 5.8% of the fund. To reverse this decree plaintiff, Whitaker Paper Company appeals.

It is the theory of appellant that the defendant Schrag had a right to give to it his note and secure the payment of the same by a chattel mortgage inasmuch as Schrag's indebtedness to appellant was a valid obligation which Schrag owed to plaintiff, even though Schrag thereby preferred the plaintiff as one of his creditors and even though he also thereby hindered and delayed his other creditors in the collection of their claims.

Atwood Vacuum Machine Company is the only defendant following this appeal and its theory is that an unsecured creditor is not permitted to obtain a preference to itself by obtaining a chattel mortgage from an insolvent debtor where no new consideration is given but which is based solely on a prior indebtedness where the intent of the creditor is to obtain a preference over other creditors then existing.

The law in Illinois is that a debtor may in good faith, prefer one creditor to another and secure the payment of a bona fide indebtedness against him. (Hurt v. Ohlman, 349 Ill. 163,170; Wood v. Clark, 121 Ill. 359,366). In the Wood case the court said (p. 366): "A debtor may prefer one creditor to another, or secure a surety who is liable for him, in preference to paying other creditors; and if he does so in good faith, without any design to conceal property from his creditors, the law will protect his act." In the Hurt case it was said (p. 170): "It is well established by the decisions of this court that a debtor may prefer one creditor over others when he acts without fraud, even though he transfers all of his property to the preferred creditor." It is equally well established that a pre-existing indebtedness is a valid and

legal consideration for the present execution of a chattel mortgage given to secure the payment of the prior indebtedness. (First National Bank v. Davis, 146 Ill. App. 462; McLeish v. Hanson, 157 Ill. App. 605.)

The question presented by this record is whether the execution of his note and chattel mortgage by Schrag and their delivery to the plaintiff giving it a preference as a creditor, was made in good faith and without any design to conceal property from other creditors. If it was, the plaintiff is entitled to his preference. It is clear that Schrag was insolvent on the date he executed the note and chattel mortgage. At that time he owed plaintiff \$19,739.27. He also owed Joseph Behr & Sons, Inc., \$2430.02, and he owed Lind-Remsen Printing Company approximately \$2175.00 for printing which had been done prior to the date of the execution of the note and chattel mortgage. Since the property covered by the chattel mortgage was sold at the foreclosure sale for \$3100.00 Schrag was undoubtedly insolvent before he executed the chattel mortgage. The execution of the note and chattel mortgage by Schrag did not render Schrag insolvent but if it did this would not, in and of itself, invalidate the chattel mortgage. In State Bank of Mansfield v. Moore State Bank, 249 Ill. App. 237, a preference made by an insolvent debtor of one creditor over another was under attack. The Court there said: (pp. 239, 240) "The testimony tended to show that at the time Thomas gave the note and mortgage to defendant in error, to secure a bona fide debt, that Thomas was hopelessly insolvent and that defendant in error had knowledge of that fact.*** The right of a debtor to pay one creditor in preference to another or to deliver property in satisfaction or

to create a lien upon such property for the security of a particular debt, in preference to and to the exclusion of all other liabilities, always existed at common law, and is the established rule in this State".

Appellee insists that the fact that Schrag was insolvent at the time of the execution of the chattel mortgage or was rendered insolvent by its execution and that there was no new consideration for the execution of the chattel mortgage, shows that Schrag's preference of the plaintiff was not made in good faith and was fraudulent and should therefore be set aside. In support of this proposition, counsel cites *Thompson v. Williams*, 6 Ill. 2d 208, and *Ziegler v. Oberneufemam*, 323 Ill. App. 317. In the *Thompson* case, the debtor attempted to make his wife a preferred creditor and considerable evidence was offered to show that the debts which the wife claimed the husband owed her were not bona fide. The court found that the evidence introduced fell short of establishing a legal and valid indebtedness between the debtor and his wife except as to one item where the proof of a valid debt was clear. In the *Ziegler* case a voluntary conveyance of a farm from a father and mother to their four sons was found to have been made without a valid consideration. The conveyances set aside in both the *Thompson* and *Ziegler* cases were voluntary ones with no consideration to support them. The facts in the instant case are not analogous to the facts in the *Thompson* and *Ziegler* cases.

In *Berry v. Hurd*, 295 Ill. App. 124, the court at page 132, said: "The fact that a conveyance would render the debtor insolvent or that the same was made at a time when the grantor was being pressed to make payment of demands to other

creditors would not render the same fraudulent or void as to creditors when based upon such adequate consideration and in payment of a bona fide pre-existing indebtedness. A debtor has a right to prefer a creditor, when he acts without fraud, even though he devotes all of his property to the preferred creditor, leaving nothing for his other creditors to resort to. Third Nat. Bank of Mt. Vernon v. Norris, supra; Woodford County National Bank of Jonklin, supra; First Nat. Bank of Flora v. Cunningham, supra; 27 C. 622."

Appellant has not appealed from that portion of the decree which directed the payment of \$628.70 to Atwood Vacuum Machine Company as rental for storage of the chattel property or from that portion of the order directing the payment of receiver's fees and insurance premiums. The decree as to those items therefore stands. Those portions of the decree, however, which directs the clerk to pay to Lind-Remsen Printing Company, Inc. \$363.00 and to pay to Joseph Behr and Sons, Inc. \$202.23 and to pay to the Atwood Vacuum Machine Company \$124.70 are reversed and this case is remanded to the Circuit Court with directions to enter an order that the clerk pay to appellant these several sums.

Reversed and remanded with
directions.

SPIVEY, P. J., concurs

MCNEAL, J. concurs

00V
47550

WILLIAM D. LARKIN,

Plaintiff - Appellant,

v.

WILLIAM GERHARDT,

Defendant - Appellee.

1
APPEAL FROM THE

SUPERIOR COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a libel and slander action. The trial court sustained defendant's motion to strike the amended complaint. Plaintiff's motion to vacate this order was denied. Plaintiff appeals.

The original complaint was filed on October 25, 1957. The amended complaint was filed on December 11, 1957. The defamation allegedly occurred on April 24, 1956, November 1, 1956 and "on or about" February 9, 1957.

The basic question presented on this appeal, the sufficiency of the complaint, involves the twofold consideration of whether plaintiff's pleadings sufficiently allege a conspiracy to do libel and slander, and whether the action is barred by the statute of limitations.

Plaintiff contends that his complaint alleges a conspiracy to do libel and slander and that the statute of limitations does not commence to run until the commission of the last overt act done in pursuance of the conspiracy. Defendant maintains that action on the alleged defamation is barred by the statute of limitations, Ill. Rev. Stat. 1957, ch. 83, § 14.

Conspiracy must be clearly charged by the facts in the pleadings. Aaron v. Dausch, 313 Ill. App. 524; 11 I. L. P., Conspiracy, § 32. Here, the only reference to persons other than defendant is in a letter, attached to the complaint, published by defendant, which is later in the complaint alleged to be "wholly false and untrue". This vague reference is clearly not sufficient to apprise defendant that he is charged with conspiracy and accordingly plaintiff has failed to state a cause of action for conspiracy to do libel and slander. Therefore we must apply the statute of limitations in the usual manner.

It is clear that action on the April 24, 1956 publication is barred, since it was not commenced until October 25, 1957. However, plaintiff contends that his amended complaint, filed December 11, 1957, and based on the alleged republication of November 1, 1956, relates back to the time of the filing of the original complaint on October 25, 1957, and therefore must be considered as an action having been brought before the expiration of the statutory limitation period. This contention fails to recognize the rule that when an amended complaint introduces a new cause of action, that cause of action is regarded as a new suit commencing on the date the amended complaint is filed. Milauskis v. Terminal Railroad Ass'n., 286 Ill. 547. Since every republication of defamatory matter ordinarily constitutes a new cause of action in this state, Graff v. Arlington Seating Co., 343 Ill. App. 266; 33 I. L. P., Slander and Libel,

-3-

§ 43, the republication on November 1, 1956, alleged in the amended complaint must be regarded as a new suit filed on December 11, 1957, and therefore not within the one year limitation period.

Plaintiff finally contends that the allegation of republication "on or about" February 9, 1957, states the date with sufficient certainty. We do not agree. Proof of a precise date is necessary where the statute of limitations is involved. People v. Taylor, 13 Ill.2d 215. The expression "on or about" is usually construed as approximately; it is sufficient where a particular date is not material. But where an exact time is essential, as it is here, the expression is too vague. See Yaw v. United States, 228 F.2d 382. Where the statute of limitations is involved, the expression has been held fatal to the pleadings. Cf. State v. Criss, 125 W. Va. 266, 23 S.E.2d 613. In our opinion the date was not alleged with sufficient certainty.

For the reasons given the judgment is affirmed.

AFFIRMED.

MURPHY AND KILEY, JJ., CONCUR.

ABSTRACT ONLY.

602
47562

AL RIEFLER,

Plaintiff - Appellant,

v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES, a
corporation,

Defendant - Appellee.

1
A
APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action under a group life insurance policy. The insurance company's motion for summary judgment was sustained. Plaintiff appeals.

Plaintiff is the beneficiary of a certificate of insurance issued on the life of Fred Braun, deceased, under a group insurance program maintained by defendant and decedent's employer. The insured passed away in December, 1953. His active employment ceased in August, 1952. The employer continued to pay premiums on this certificate until December, 1952; and also paid Braun \$25. per week until his death. By the terms of the group policy, insurance stops upon cessation of premium payments or termination of employment, with a privilege of conversion to an individual policy.

The affidavits filed with defendant's motion state that late in 1952, the employer notified defendant that Braun was no longer employed and that his insurance was terminated; that the \$25. weekly payments were gratuitous; that decedent was personally informed of the termination and his conversion rights and elected not to convert; and that plaintiff was likewise

*Modified Page
no change in
substance*

-2-

personally informed of the termination. Plaintiff's counter-affidavit states that Braun was merely on sick leave and intended to resume his employment when able to do so; that neither plaintiff nor Braun received any notice of termination of employment; and that the \$25. weekly payments were sick leave pay rather than gratuitous.

Plaintiff contends that there were triable issues of fact and that he was deprived of his right to a jury trial by the summary judgment; and that the cancellation of insurance was not effective because there was no notice to the insured or his beneficiary, the plaintiff.

The statements in plaintiff's affidavit purporting to raise factual issues would not be admissible at trial and should not be considered on a motion for summary judgment, because they are clearly not based on personal knowledge as required by Supreme Court Rule 15, Ill. Rev. Stat. 1957, ch. 110, § 101.15. In our opinion there were no material factual issues before the trial court and summary judgment was proper. See Killian v. Welfare Engineering Co., 328 Ill. App. 375; 23 I.L.P., Judgments, § 75. The question of whether plaintiff received notice is not material.

As to the question of proper notice to the employee, defendant's affidavits state that proper notice of termination of employment and cancellation of insurance was given to the insured. Since plaintiff's affidavit on this point is not to be considered, Supreme Court Rule 15, there is no issue with respect to notice to the employee. The cases cited by plaintiff, Kolodziej v. Metropolitan Life Insurance



-2-

personally informed of the termination. Plaintiff's counter-affidavit states that Braun was merely on sick leave and intended to resume his employment when able to do so; that neither plaintiff nor Braun received any notice of termination of employment; and that the \$25. weekly payments were sick leave pay rather than gratuitous.

Plaintiff contends that there were triable issues of fact and that he was deprived of his right to a jury trial by the summary judgment; and that the cancellation of insurance was not effective because there was no notice to the insured or his beneficiary, the plaintiff.

The statements in plaintiff's affidavit purporting to raise factual issues would not be admissible at trial and should not be considered on a motion for summary judgment, because they are clearly not based on personal knowledge as required by Supreme Court Rule 15, Ill. Rev. Stat. 1957, ch. 110, § 101.15. In our opinion there were no material factual issues before the trial court and summary judgment was proper. See Killian v. Welfare Engineering Co., 328 Ill. App. 375; 23 I. L. P., Judgments, § 75. The question of whether plaintiff received notice is not material.

The trial court could have reasonably found on the affidavits of defendant that proper notice of termination of employment and cancellation of insurance was given to the insured. Nothing more is required by the terms of the policy or the law. The cases cited by plaintiff, Kolodziej v. Metropolitan Life Ins.

)
)

-3-

Co., 307 Ill. App. 657; Emerick v. Connecticut General Life Ins. Co., 120 Conn. 60, 179 Atl. 335; Poch v. Equitable Life Assurance Society, 343 Pa. 119, 22 A.2d 590, require notice to the employee-insured not to the beneficiary. Since the purpose of notice is to give the insured an opportunity to exercise his conversion privilege, notice to a beneficiary would be meaningless and useless. The beneficiary can do nothing to prevent the termination of insurance if the insured elects not to convert because the insured alone can exercise this privilege. Crutchfield v. Continental Assurance Co., 336 Ill. App. 411; 22 I. L. P., Insurance, § 166.

For the reasons indicated the summary judgment was proper and is affirmed.

AFFIRMED.

MURPHY AND KILEY, JJ., CONCUR.

ABSTRACT ONLY.

3

A

47596

MARY McDILL d/b/a POWER LETTER
SERVICE,

Appellee,

v.

KAISER ALUMINUM & CHEMICAL SALES,
INC.,

Appellant.

}
} APPEAL FROM
}
} MUNICIPAL COURT
}
} OF CHICAGO.

2d 132-23
2d 132-23

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment of \$1,985, awarded plaintiff for preparing typewritten lists. There is no dispute as to ordering the work, that it was satisfactory, accepted, retained and used by defendant. The real dispute is as to price. The principal question is whether there are any triable issues of fact raised by the pleadings, exhibits and affidavits; if not, the judgment order should stand. J. J. Brown Co., Inc. v. J. L. Simmons Co., Inc., 2 Ill. App. 2d 132; 23 I. L. P., Ch. 5, §73.

The pleadings and affidavits show that prior to April 30, 1957, defendant requested plaintiff, Mary McDill, doing business as Power Letter Service, to prepare, in triplicate, typewritten lists of its customers and prospects for four books distributed by defendant. These books described technical uses of aluminum, and each book was named for the topic or use covered. A separate list was to be prepared for each book. Three lists were completed, delivered, retained and used by defendant. An invoice for the first list, 252 pages, dated April 30, 1957,

and for \$496.75, was paid by defendant in routine fashion and without objection. The invoice for the second list, 669 pages, is dated June 21, 1957, and is for \$1,275.50.

On June 25, 1957, defendant telephoned plaintiff that her charges were excessive and defendant would pay only the reasonable, usual and customary rate for such work; also, that the first invoice was paid through a mistake, and defendant was entitled to a refund for the excess over and above a reasonable charge. At that time, plaintiff had substantially completed the third list.

Under date of July 3, defendant wrote plaintiff, setting forth competitive prices that it had secured from other typing services, outlined what it believed to be a fair price basis for the work done, and offered to pay on that basis. Request was made for the correction of the first invoice; also, if the rate was not satisfactory, to return the material on the third list and invoice for work done. This third list, 365 pages, not entirely completed, was delivered to and accepted by defendant on July 11, 1957, with an invoice for \$709.50. The invoices appear to be computed on a price per page basis. The summary judgment is for the total amount of the second and third invoices. Defendant does not seek a refund of any part of the payment made for list 1.

Defendant asserts, as there was no agreed price for the order, that because of a previous course of dealing with plaintiff for several years, there was an understanding that

plaintiff's price for the work ordered would be the reasonable and customary rates currently prevailing in the Chicago area, which presents genuine issues of material facts. It also argues that the contract is divisible.

The question of whether the original order created a divisible and severable contract is not of controlling importance, and the price charged for work done prior to the order in controversy is not a proper issue in view of our ultimate conclusion.

We do not believe that the price here is to be determined by the reasonable and customary rates prevailing at the time the order was placed. Defendant paid the invoice of April 30, 1957, without protest, and does not allege or charge that plaintiff was in any way responsible for defendant's failure to scrutinize the invoice before paying it. It may not avoid the effect of that invoice payment on the ground it was in ignorance of its contents, where this was due to the carelessness of its employees. The acceptance of the first installment of the material and payment of the invoice, without protest, established a course of dealing as to price, upon which plaintiff was entitled to rely for the remainder of the work ordered, until notified that her charges were not acceptable.

Defendant, having accepted and retained the second and third lists, with knowledge of the price plaintiff charged and expected to receive, cannot avoid payment of the price stated in the invoices. The law implies that defendant promised to pay the price when it took the lists with knowledge of plaintiff's price. The minds of the parties not having met upon

-4-

price, it was defendant's duty, when it received lists 2 and 3 with knowledge of the price, to refuse to accept them if it was not willing to pay the price stated in the invoices. Genuine Panama Hat Works v. Paragon Hat Co., 245 Ill. App. 531, 539 (1927); Voit Rubber Co. v. Peoria Coca Cola Bottling Co., 280 Ill. App. 14, 18 (1935); 46 Am. Jur. Sales, sec. 180, p. 361.

Defendant argues it chose to keep lists 2 and 3, because it hired plaintiff to perform certain services at reasonable and customary prices then prevailing, and that it is entitled to its bargain. That defense is not available here. Having taken the material and used it, defendant became liable to pay the invoice price and cannot defend on the theory that the price was not reasonable and customary for the work done.

We believe the trial judge was correct in his application of the law to the undisputed facts set forth in the pleadings and affidavits, and that there was no "genuine issue" as to any material fact. The facts entitled plaintiff to judgment as a matter of law.

AFFIRMED.

LEWE, P.J., and KILEY, J., CONCUR.

ABSTRACT ONLY.

47631

ANNE K. MARKS,

Plaintiff,

v.

CHECKER TAXI COMPANY and THE CITY OF
CHICAGO, a Municipal Corporation,

Defendants.

SHERWIN & SHERWIN,

Petitioners-Appellees,

v.

CITY OF CHICAGO, a Municipal Corpora-
tion,

Defendant-Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

The City of Chicago appeals from an order directing its comptroller to pay petitioners, Sherwin & Sherwin, a sum of money in satisfaction of their attorneys' lien on an unpaid personal injury judgment. The sole question is the enforceability of an attorneys' lien against a municipal corporation.

Petitioners were the attorneys for Anne K. Marks, plaintiff, recovering for her a judgment for \$2500 against the City of Chicago on November 28, 1956. In February, 1958, petitioners informed her that the City was ready to pay the judgment, but she refused to endorse the City check. Petitioners then served notice of attorneys' lien and filed a petition in the original suit, seeking disposition and adjudication of their attorneys' lien. On March 17, 1958, the court entered

an order directing the comptroller of the City of Chicago to pay petitioners, "attorneys for Ann Marks, in the above-entitled cause, the sum of \$885.50 in full settlement and satisfaction of their attorney's lien in the judgment rendered against the City of Chicago." The court denied a motion to vacate this order, and the City appeals.

Petitioners contend that the service of their attorneys' lien on the City effectuated an assignment to appellees of an interest in the judgment; that they are entitled to their pro rata share of the judgment; and that the order should be sustained because "it does not affect any City property but is directed to the funds on hand to pay the judgment," and is not the basis for any execution or garnishment proceedings.

In construing the Illinois Attorney's Lien statute, our courts have repeatedly followed Baker v. Baker, 258 Ill. 418 (1913), where the court said (p. 421):

"By serving the notice claiming a lien the attorney in effect becomes a joint claimant with his client in any judgment or decree that may be rendered or in the proceeds of any settlement that may be made by the client, and to the extent of the amount of his fee has the same interest in such proceeds, judgment or decree as his client and is entitled to his pro rata share thereof."

This construction has been followed in some condemnation suits, where the award was deposited with the County Treasurer (City of Chicago v. Goebel, 301 Ill. App. 73 (1939)), and where a chancery suit decided adverse claims to the award, which had not been distributed by the City, and where the City indicated its willingness to abide by the order of the court with reference to the payment of the award (Mid-City Trust & Savings Bank v. Chicago, 292 Ill. App. 471, 478 (1937)).

The City contends that the Illinois decisions have established a public policy against embroiling the City of Chicago in private litigation, in which it has no direct interest, starting with City of Chicago v. Hasley, 25 Ill. 485 (Orig. Ed. 595) (1861); Merwin v. City of Chicago, 45 Ill. 133; Addyston Pipe & Steel Co. v. City of Chicago, 170 Ill. 580. In Merwin v. City of Chicago, 45 Ill. 133, 136, the court said:

"A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another."

In a situation very similar to the instant one, which involved a petition to collect attorney's fees out of a personal injury judgment against the City, in Brazil v. City of Chicago, 315 Ill. App. 436 (1942), the trial court entered a judgment against the City for the attorney's fees. This Court reviewed at length, the Illinois authorities, wherein the rule is developed that, as a matter of public policy, the City should not become involved in this kind of controversy pertaining to purely private interest.

Petitioners argued that the City is not involved in private litigation in which it has no interest, but that the City is directly interested in the payment of the judgment, which takes it out of the public policy rule. We do not agree.

The core of this order and appeal is the dispute between Anne K. Marks and petitioners, over the payment of attorneys' fees, and the City has been drawn into litigation and a controversy, in which the City, obviously, has "no interest."

We are sympathetic with an attempt to collect attorneys' fees for work done. However, we believe that the public policy, that a municipal corporation cannot be made an instrument or agency for the collection of private debts, is controlling in this case, and therefore the order appealed from should be reversed, even though execution or garnishment process is not sought to enforce it. This conclusion disposes of the necessity of ruling on motions to file a supplemental record.

REVERSED.

LEWE, P.J., and KILEY, J., CONCUR.

ABSTRACT ONLY.

601
47574

GULF OIL CORPORATION,

Plaintiff - Appellee,

v.

VILLAGE OF MELROSE PARK and EDWARD
J. BENNISH, BUILDING COMMISSIONER,

Defendants - Appellants.

A
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.
2d

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint for declaratory judgment involving the validity of a zoning ordinance of defendant Village. Defendant's motion to strike the complaint was denied and defendant was given 20 days within which to answer. Defendant failed to answer whereupon the trial court entered judgment in favor of plaintiff. Defendant appeals.

The motion to strike the complaint admits the well pleaded facts of the complaint. Plaintiff has an option to buy certain property in the Village upon which it intends to erect a gasoline station; it is willing to conform with all Village ordinances and regulations except the frontage consent ordinance; the property involved is located in a business district across the street from another gas station. It alleges that the frontage consent ordinance as applied to the property involved is arbitrary and unreasonable.

The ordinance in question provides in substance that a building permit shall not issue for a gasoline station unless a petition, containing the names of the majority of the adjoining property owners within 100 feet of the proposed gasoline station, is submitted by the applicant.

The basic issue presented on this appeal is the validity of the frontage consent ordinance.

Defendant contends that plaintiff was not entitled to the judgment order because plaintiff failed to attach a copy of the alleged option and failed to set out the ordinance in detail. In our opinion these contentions are devoid of merit.

It is settled beyond controversy that a court may take judicial notice of municipal ordinances existing within the judicial district. Ill. Rev. Stat. 1957, ch. 51 § 48a; In re East Maine Tp. Community Ass'n, 15 Ill. App.2d 250; 18 I. L. P., Evidence, § 8; and that a reviewing court may take judicial notice of all matters judicially noticed by the lower court. Ill. Rev. Stat. 1957, ch. 51, § 48b. Therefore, failure to set out the ordinance in detail can not be regarded as error.

The alleged option was not the basis of this action. Defendant's refusal to issue a building permit is the basis. Therefore section 36 of the Civil Practice Act, Ill. Rev. Stat. 1957, ch. 110 § 36, does not require a copy to be attached to the complaint. See Simpkins v. Maras, 17 Ill. App.2d 238.

Generally frontage consent ordinances, as applied to gasoline stations and stores located in a business district, have been looked on with disfavor by the courts. Wolford v. City of Chicago, 9 Ill.2d 613; Koos v. Saunders, 349 Ill. 442; Spies v. Board of Appeals, 337 Ill. 507. We agree with Wolford v. City of Chicago, that the "operation of a gasoline station

-3-

will not be inconsistent with the character of such a district" and that frontage consent ordinances are "arbitrary and oppressive" insofar as they prevent a gasoline station within such a district.

A declaratory judgment proceeding is a proper method of testing the validity of an ordinance, see Dean Milk Co. v. City of Aurora, 404 Ill. 331, and in our opinion the court properly entered judgment for plaintiff after defendant's failure to plead. See Ill. Rev. Stat. 1957, ch. 110 § 50(5). Furthermore we think plaintiff, as an option holder, has a sufficient property interest to institute declaratory judgment proceedings.

We agree with the trial court that the frontage consent ordinance is arbitrary and unreasonable and that plaintiff is entitled to erect its intended gasoline station. For the reasons given the judgment is affirmed.

AFFIRMED.

KILEY AND MURPHY, JJ. CONCUR.

ABSTRACT ONLY.

47554

JAMES M. DOMER,

Appellee,

v.

THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

21 1 21 1952

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a \$25,000 verdict and judgment, entered in an F.E.L.A. suit brought by a switchman, who was injured while on duty.

The accident occurred in defendant's Brewster, Ohio, yards on February 14, 1952, during a switching movement. It was dark, and signals were given by lantern. Brewster yard consists of two sections, the "long yard," and about 1500 feet west, the "short yard." Eastbound trains are made up in the "long yard" and westbound in the "short yard." In the "long yard" is a lead track, which runs in a northwesterly direction, and branching off of it to the west are eight parallel switch tracks, running from east to west. They are numbered 1 to 8 and are 4,000 to 5,000 feet in length. Track No. 8, called "No. 8 lead," continues westerly beyond the west end of the "long yard" to the "short yard," and is used as a connecting track between the two yards. The "short yard" has ten parallel tracks, also running from east to west. In making up trains, freight cars are switched back and forth between the two yards over "No. 8 lead."

The switching crew consisted of an engineer, fireman, yard switchman (plaintiff), a field man, and a conductor, who was in charge of the crew. They were in the "long yard" engaged in classifying cars and had started with a string of twenty-nine cars taken from track No. 5. The engine faced the cars, as most of the activity consisted of pushing the cars ahead of the engine, which meant that the engineer was on the right and the fireman on the left, both facing the cars being moved. The field man, whose duty was to line up switches, left for the "short yard" after the twenty-nine cars were initially moved from track No. 5. Plaintiff pulled coupling pins between the cars as they were cut off and relocated. It was necessary to switch the string of twenty-nine cars back and forth on the lead track, distributing them between tracks No. 5 and No. 8, before eight cars were ultimately assembled and ready to be pushed over "No. 8 lead" to the "short yard."

Six cars were left on "No. 8 lead" and then twenty-one cars were "kicked" back onto track No. 5, with plaintiff "riding in" on them. The engine, pushing two remaining cars, headed north to couple with the six cars on the lead track, with the conductor on the leading end of the cars and controlling the movement. When the engine and the two cars came to ^{the} six cars previously placed on "No. 8 lead," a coupling was made and the cut "stretched." This is a usual and customary move after a coupling is made. The cars are moved forward 75 to 100 feet, and the engine then stops, using its engine brakes. This technique tests the security of the couplings. After the cars were

"stretched," part were still on a curve, and the conductor desired to get them "straightened" out so he could better see the engineer from the leading car on the west end, on which he was going to ride to the "short yard." This necessitated pushing the cars forward again. He stationed himself on the ground, north of track No. 8, and gave the signals for the engineer to start and to stop, and it was on this movement the plaintiff was injured.

The principal contention of defendant is that, as a matter of law, there was no showing that the negligence of plaintiff's fellow employees, in any degree, however small, played any part in causing the injuries which are the subject of the instant case. (Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 507-8.) On this contention we apply the familiar rule, that it is the duty of this court to examine the record and determine whether there is any evidence which, standing alone and taken with all its intendment most favorable to plaintiff, tends to prove the material elements of his case. Sims v. Chicago Transit Authority, 4 Ill.2d 60 (1954).

There was testimony that, while on track No. 5, plaintiff notified the conductor he would be on the "No. 8 lead"; that he walked across tracks Nos. 6 and 7 to the west end of the six-car cut on track No. 8; that it was his duty to ride the leading end of these cars to the "short yard," in order to signal the engineer in case of danger, and also to be in position to line up switches and pull pins when they arrived in the "short yard"; that he stood on the south side

of the cars and waited while the "stretch" was made and the cars stopped; that then the cars started moving toward the "short yard," and he mounted the trailing end of the leading car, in order to cross over the top to get to the engineer's side, to be in a position to give signals to the engineer; that while on the top, he gave the fireman a "steady" signal with his lantern; that he then stepped over to the next car and started to climb down the ladder; and that as the cars were going five miles an hour, there was a sudden stop, without signal, and he was thrown to the ground and injured.

It is undisputed that the stop caused plaintiff to fall to the ground. The conductor was in charge and was responsible for the safety of his men. He gave plaintiff no instructions when he last saw plaintiff on track No. 5 and inferentially denied that plaintiff told him he would be on the "No. 8 lead." These switching movements involve considerable bumping and jerking, and switchmen are necessarily moving in between and over cars, coupling and uncoupling and giving signals. We think reasonable men might conclude it was negligence for the conductor to order both the "stretching" and "straightening" movements without knowledge as to plaintiff's whereabouts. We believe reasonable men might also conclude that the evidence showed a duty on the other members of the crew, not knowing plaintiff's whereabouts, to give some signal or warning to plaintiff before commencing the two movements, even though these movements, as argued, might be considered as made in a usual manner, providing no crew member was in a place of danger. We

think there was evidence tending to prove that the conductor and the other crew members were guilty of a lack of due care for plaintiff's safety, in not warning him of the impending movements or taking other steps to protect him. The court was correct in denying defendant's motion for judgment notwithstanding the verdict.

Defendant contends that the court improperly admitted in evidence seven of its operating rules, which served to divert the attention of the jury from the principal issue and to create a vehicle for plaintiff's counsel to make an inflammatory and confusing argument to the jury and to make it a "rules violation" case. The rules have some basis for application to the occurrence to warrant their admission in evidence. We cannot say the court abused its discretion. It was for the jury to decide whether the rules applied to the instant situation.

Defendant's peremptory instructions Nos. 9 and 10 were properly refused. No. 9 would have unduly restricted the consideration by the jury of other factors, which we believe important, including the questions of whether the fireman was in a position to see plaintiff's signal and had not maintained a proper lookout, and whether the conductor was negligent under the circumstances. No. 10 is objectionable because it limits the test, of whether plaintiff was in a position of danger, to the top of the car in question, whereas we believe it should have included any position of danger incident to the facts of the occurrence. We agree that "a party to a cause of action is

entitled to instructions which apply directly and specifically to his theory of the facts, when there is evidence tending to prove these facts." However, an instruction which has the effect of directing a verdict must inform the jury of every material question of fact in controversy. (DeLegge v. Karlsen, 17 Ill. App.2d 69 (1958).) We believe these two instructions improperly split the whole question as to defendant's negligence and impliedly directed a verdict on less than all of the necessary elements to be determined.

The trial court properly refused two interrogatories tendered by defendant. Both are framed on the same theory as are instructions Nos. 9 and 10, and call for answers to questions which would not control a general verdict inconsistent with the answers. This again was a splitting of the general issue of negligence, and both failed to include elements we deem necessary to control a general verdict.

Defendant contends that the court committed prejudicial error in permitting plaintiff to prove his present physical condition, despite subsequent injury on August 20, 1955. The complaint filed in the pending second suit alleges aggravation of the injuries of February 14, 1952. It is true that plaintiff cannot recover in the instant action for any present physical condition attributable to the second accident.

As a result of the first accident, plaintiff required considerable medical attention and suffered excruciating pain. A full body cast was applied and a pin inserted in his ankle. He wore a back brace for a long time. He returned to the same

-7-

work for defendant in September, 1953. He was again injured on August 20, 1955, and was out of work for six weeks. After the six-week period, he worked continuously until the trial. He testified he was making no claim for this six-week period, and that it had nothing to do with the first accident sued on. He described his present physical condition, the same as in 1954, as a limitation of back motion with intermittent pain, which did not interfere with his job to any great extent. He said, "I am working and putting up with it, and I was told to live with it, and that is what I am doing."

An orthopedic surgeon testified he examined plaintiff in 1952, 1953, 1955 and January 20, 1958; that in 1952 he had compression fractures of the first and second lumbar vertebrae, and a probable fracture of the right ankle; that an X-ray examination on January 20, 1958, showed a "nice result"; that plaintiff has compression fractures of the first and second lumbar vertebrae, loss of the intervertebral disc space between the twelfth dorsal and first lumbar and some absorption of the disc between the first and second lumbar vertebrae; and that he has residual stiffness in the back, with limited bending ability. His opinion is that the condition could have resulted from a fall, described from the evidence and similar to the fall of plaintiff in 1952.

Defendant argues that the court should have limited the physical condition testimony to the time prior to the second accident on August 20, 1955. We do not agree. There is no

-8-

testimony in the record as to the second accident, nor that it contributed or aggravated to any degree the physical condition described by plaintiff or by the doctor at the time of the trial. We do not see how defendant was prejudiced, and we find no error in the court's ruling.

For the reasons given, we conclude the judgment should be affirmed.

AFFIRMED.

LEWE, P.J., and KILEY, J., CONCUR.

ABSTRACT ONLY.

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10220 ✓

Agenda C.

Albert Sokolis and L. M. Owen,
Plaintiffs-appellees,

vs.

Zoning Board of appeals of the City of
Springfield, Illinois, and administrative
agency, et al.,

Defendants.

#

Zoning Board of Appeals of the City of
Springfield, Illinois, an administrative
agency, John P. Hiler, Bernard Dressendorfer,
George L. Curry, Daniel A. Buck, L. Marguerite
Hiler, Marjorie Dressendorfer, Genevieve C.
Curry and Mrs. Daniel A. Buck,

Defendants - Appellants.

REYNOLDS, J.

This is an Administrative Review case brought by the
plaintiffs in the Circuit Court of Sangamon County, against the
Zoning Board of appeals of the City of Springfield, Illinois,
seeking review of the action of the said Zoning Board in refusing

Wang et al.

100

2. 4

4

•

•

34

2

4

3

1

4

"3"

10

1

2

1

3

2.

4

2

1

1

1

Figure 1. Schematic representation of the experimental design. The subjects were divided into two groups: the control group and the experimental group. The control group received a standard diet, while the experimental group received a diet supplemented with 10% of the total energy from fat. The subjects were then divided into two subgroups: the control subgroup and the experimental subgroup. The control subgroup received a standard diet, while the experimental subgroup received a diet supplemented with 10% of the total energy from fat. The subjects were then divided into two subgroups: the control subgroup and the experimental subgroup. The control subgroup received a standard diet, while the experimental subgroup received a diet supplemented with 10% of the total energy from fat.

[illegible]

to grant the plaintiffs a variance under the zoning ordinance of the City of Springfield, to allow the use of certain premises zoned as "residential" for use as a gasoline filling station. The Circuit Court reversed the order of the Zoning Board and granted the plaintiffs the variance requested. The case comes to this court on appeal from that order. The matter comes to this court on the abstract of record and the brief of the defendant board, the plaintiffs not filing any brief.

Two questions are raised in the appeal. 1. That the Circuit Court lacked jurisdiction to hear the cause, for the reason that some fifty-nine individual objectors to the granting of the use variance were not named as defendants to the action, within the time and in the manner required by the Administrative Review Act. 2. Where the decision of the administrative agency is not contrary to the manifest weight of the evidence, the reviewing courts will not reverse the decision of the agency.

The original petition for administrative review by the plaintiffs named as defendants only the Zoning Board and the seven members of the Board, although it appears that some fifty-nine property owners later appeared before the Zoning Board as objectors to the petition of the plaintiffs. The hearing was held before the Zoning Board on June 20, 1957, and the vote of the members present being

three "Aye" and three "No", the petition was denied. Petition for administrative review was filed in the Circuit Court on July 12, 1957, well within the 35 day limitation for filing such a petition for review. On November 7, 1957, some 140 days after the decision of the Zoning Board, the plaintiffs moved to bring in additional parties defendant, naming the 59 objectors, and motion was granted by the court. Later, some of the objectors moved to dismiss the complaint on the ground that they were not named as defendants within the 35 day period, and therefore the court had no jurisdiction to hear the matter, and on March 7, 1958, the Circuit Court denied the motion to dismiss. The trial court in reversing the order of the Zoning Board held that because the vote was even, three "for" and three "against", that there was no finding of fact by the board and that all that could be found by the court was that the findings of fact were evenly balanced. The court also held that the decision purports to deny the proposed use variance upon a finding of fact whereas the decision clearly established that denial was actually based upon failure of motion for proposed use variance to receive a concurring vote of four members of the Zoning Board. The court further found that the manifest weight of the evidence established (a) There are practical difficulties and hardships in the way of

carrying out the strict letter of the use of said real estate for "A" residence purposes. (b) The real estate cannot yield a reasonable return if permitted to be used under the present conditions of "A" Residential District. (c) The plight of the plaintiffs is due to unique circumstances. (d) The variation will not alter the essential character of the locality, and held that the plaintiffs were lawfully entitled to the relief sought before the Zoning Board. From that decision, entered on June 30, 1958, the defendants appeal to this court.

As to the first contention of the defendants, that the Circuit Court, never acquired jurisdiction, because of the failure of the plaintiffs to name as party defendants, the 53 objectors, the defendants, rely upon the cases of Winston v. Zoning Board of Appeals, 407 Ill. 588; Cuny v. Annunzio, 411 Ill. 613; Georgeoff v. Spencer, 400 Ill. 300; Babington v. County Board of School Trustees, 7 Ill. App. 2d 193. While the case of Georgeoff v. Spencer, does not appear in point, the other three cases are authority to the effect that all parties other than the plaintiffs, who were parties of record to the administrative proceedings, shall be made defendants to an action to review the decision of the administrative body. These cases hold that this provision of the Administrative Review Act, (Section 271, Chapter 110, Illinois Revised Statutes 1957) is mandatory and specific and admits of no modification, as the act is an innovation

and departure from the common law and the procedure it establishes must be pursued in order to justify its application. These cases only emphasize the language of the Statute, since Section 8 of the Administrative Review Act, Chapter 110, Section 271, Illinois Revised Statutes makes this requirement in the following language: "In any action to review any final decision of an administrative agency, the administrative agency and all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants." While this requirement is mandatory, there is nothing in the Administrative Review Act which requires that all persons who were parties of record to the proceedings before the administrative agency shall be made defendants within the 35 day limitation for filing the petition for administrative review.

Section 14 of the Administrative Review Act, (Section 277, Chapter 110, Illinois Revised Statutes, 1957) provides that "the provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act."

Section 46 of the Civil Practice Act, (Section 46, Chapter 110, Illinois Revised Statutes (1957), provides for amendments to complaints in the following language: "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand."

And the same section, continuing, says: "The cause of action, cross demand or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed,***". (The emphasis is ours.)

Here the original petition for administrative review was filed within the 35 day limitation for such petitions. Under the authority of Sections 46 and 277, Chapter 110, Illinois Revised Statutes, (1957), the Circuit Court had jurisdiction and properly permitted the

amendment of the complaint by adding other necessary parties - defendant.

The second point raised by the appeal is that where the question of how property should be zoned is fairly debatable and the action of the municipal authorities is not contrary to the manifest weight of the evidence, the courts will not reverse the action of the municipal authorities. Although the record does not show it, there was originally a zoning ordinance which set up, subject to the City Council of Springfield, a zoning ordinance for the city. The provisions of this ordinance as it related to the zoning of certain territories into various classifications such as a residential, business or commercial, heavy industry and the like, can only be varied by an order of the zoning board of appeals. This Board is composed of seven members and any variance of the municipal ordinance can only be varied by the affirmative vote of four of the members of the board. In the instant case, only six of the members were present and the vote was even, three for the granting of the variance and three against it. The petition therefore was denied, under the provisions of Section 73-2, subsection (8), Chapter 41, Illinois Revised Statutes (1957). That subsection provides that the concurring vote of four members of the board is necessary to reverse any order, requirement, decision, or determination of the

administrative official charged with the enforcement of the zoning ordinance.

The zoning board of appeals in its decision made a finding as follows:-

"This Board by reason hereof, having jurisdiction in the matter, and having been evidence in support of the petition, and evidence presented by all interested parties, and appeared at the public hearing, the board finds:

1. The petitioners are the contract purchaser for the above described property.
2. The property is presently classified as "R" Residential District under the Springfield zoning ordinance.
3. That there are no practical difficulties nor hardships in carrying out to the strict letter of the use of said property for "R" Residence purposes.
4. That the property can yield a reasonable financial return to the owners as permitted to be used under the present conditions of "R" Residential District.
5. That the plight of the petitioners is not due to unique circumstances.
6. That the variation, if granted, will alter the essential character of the locality."

The Circuit Court in reversing the decision of the Zoning Board held that the decision shows on its face that findings of fact, being Paragraphs 3, 4, 5 and 6 of the above decision as set out above, were erroneous and in error; that there could be no such findings of fact when three of the members voted "for" and three members vote "against" the proposed use variation, and that all that could be found by the board was that findings of fact were evenly balanced. The court further found that while the decision purported to deny the proposed use variation upon a finding of fact it was clearly established that the denial was actually based upon failure of action to grant the proposed use variation to receive a concurring vote of four members of the board. And the court then found that the manifest weight of the evidence clearly established that:

- (a) There are practical difficulties and hardships in the way of carrying out the strict letter of the use of said real estate for "A" residence purposes.
- (b) The real estate cannot yield a reasonable return if permitted to be used under the present conditions of "A" Residential District.
- (c) The plight of the plaintiffs is due to unique circumstances.
- (d) The variation will not alter the essential character of the locality.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

1. *Phragmites australis* (Cav.) Trin. ex Steud.

202

There are three statutory requirements to be established affirmatively by the petitioner for the use variance, before it can be granted, namely (a) the real estate cannot yield a reasonable return under the present zoning; (b) the plight of the petitioner is due to unique circumstances; (c) the variation will not alter the essential character of the locality. Cities and Villages Act, Chapter 24, Section 73-4 (b), Illinois Revised Statutes (1957). These same requirements are set forth in the ordinance of the City of Springfield, Springfield City Code, 1953, as amended, Section 49.41, par. 3.

This court agrees with the Circuit Court in its holding that there can be no finding of fact by a board evenly divided "for" and "against" a proposition. The only decision that the Board of Zoning Appeals could make, was the motion or petition was denied because it failed to receive the concurring four votes necessary to authorize the requested use variance. But the decision of the Circuit Court in finding affirmatively as to the three questions of fact required by the statute and the city code, presents questions that necessitate the examination of the evidence before the board, since the Circuit Court in passing on the matter is limited to consideration of the record and that alone.

1. The first part of the paper
is devoted to a general
discussion of the problem
of the existence of solutions
of the system of equations

in the case of a general
system of equations
of the type

where A is a matrix
of the type

and b is a vector
of the type

where α is a scalar

The scope of the inquiry that can be made in a reviewing court in an administrative review matter has been well set forth in the case of Community Unit School District v. County Board, etc., 9 Ill. App. 2d 116. The Circuit Court in a review of a decision of an administrative agency has no power to conduct a hearing de novo or to reweigh the evidence, but it has the duty to review the record to determine if the findings and decision of the administrative agency are supported by competent evidence. Harrison v. Civil Service Commission of Chicago, 1 Ill. App. 2d 12; Stricklin v. Annunzio, 412 Ill. 314; Seeger v. Illinois Civil Service Commission, 49 Ill. 197. It is only where the decision of the administrative agency is without substantial foundation in the record or is manifestly against the weight of the evidence that the decision will be set aside. Community Council, Ltd. v. County Board, 7 Ill. App. 2d 96; Brenner v. Civil Service Commission, 196 Ill. 219; Swald v. Civil Service Commission, 160 Ill. 306; Meridith v. Board of Education, etc., 7 Ill. App. 2d 477; Seeger v. Board of Education, 13 Ill. App. 2d 44.

In the instant case, while the decision of the County Board of Appeals, based upon the lack of the four necessary affirmative votes was not a decision on questions of fact, it was nevertheless a decision predicated upon the requirements of the statute and the City of

Springfield Zoning Ordinance. Not being a decision of a question of fact, the Circuit Court had a right to examine the evidence and pass upon it. Since that right was as a reviewing court, this court will have the same right to examine the evidence and pass upon its sufficiency or insufficiency.

Without going into the details of the testimony before the Board, the record shows that nine witnesses testified before the Board on behalf of the petitioners, and four for the objectors. Of the nine witnesses who testified for the petitioners, two were the petitioners themselves, one a real estate broker, one the owner, Jean Taylor, two who testified as to the type of building to be constructed, if the variance was granted, and three homeowners who resided in the immediate vicinity. These three homeowners felt that the granting of the variance and the construction of the filling station would increase the value of their property. In addition, the petitioners submitted an appraisal of the property and pictures of the vicinity, and a signed petition signed by 12 property owners in favor of the variance. The objectors had four witnesses, three of them residents who testified, that it would injure their property from a residential standpoint. The other witness for the objectors took pictures of the area. The objectors introduced these pictures and a plat showing the zoning lay-out of the area. In addition they presented the written objection of fifty-nine residents in the immediate vicinity,

28 of these homeowners in the vicinity, 11 of whom were white.

It entered into the testimony that the defendant, Robert Tokolis and L.S. [redacted] real estate brokers in Springfield. They entered into a purchase agreement with [redacted]

either for the purchase of the property for \$17,000. [redacted] testified estimated the value of the land purchase at \$17,000. [redacted] or \$7500.00 for the land and estimated the value of the house thereon at \$4,000.00. The only logical conclusion is that the [redacted] this land with the expectation of asking for this [redacted] not for residential purposes. They did not have [redacted] when they entered into the purchase agreement that the property was [redacted].

Residential, and that the return on the investment in [redacted] could be rather low, due to the condition of the house. In other words, this was a gamble on their part but they [redacted] the [redacted] and put up the filling station. The plat submitted to the [redacted] shows the property to be in the center of a [redacted] residential area, the only exceptions being [redacted] in the block [redacted] and a paint store in the block across [redacted] Avenue, and [redacted] shop at the other end of the block in which the property was located. Across MacArthur Boulevard immediately one-half block distant from the property in question it is [redacted] for commercial purposes, but the immediate area around the proposed filling station site for a

considerable distance either way from residential areas. The plaintiffs propose to put this filling station on the west side of the residential area. It is undoubtedly true that the filling station and the complex apartments will be so close together that the noise and other nuisances will be considerable. It is also undoubtedly true that the house would cost some \$175,000, and the cost of the filling station and the complex would reduce the return to the owner to the point where the investment would be a hardship on the owner. But, because of these factors and other estate problems, the two plaintiffs, who are married and entered into a partnership agreement with the owner to buy the property for \$2500.00 more than it was worth for cash, did not buy the property in conformity with the main classification of the area. Since these plaintiffs deliberately and knowingly put themselves in this position, it is difficult for this court to follow the reasoning of the Circuit Court when it holds that the classification of the plaintiffs is due to unique circumstances. It is also difficult to believe that the allowance of the building of a filling station, in the middle of an area classified as residential and which is surrounded by houses, would be a better place for a filling station in the locality. It might well be true that the front of the street, MacArthur Boulevard, is too narrow and crowded, but the fact remains that in this immediate area it is still residential and the question

and use of this site for a filling station would unquestionably alter the essential character of the locality. It would place almost in the center of this area of homes a commercial establishment. While it might, as stated by some of the witnesses for the plaintiffs, increase the value of their property, the increase would be for a commercial use and not for residential use.

In the opinion of this court the evidence is insufficient to sustain two of the three essential elements necessary to permit a use variation of the zoning classification of this property, namely, the plaintiffs have failed to prove by competent testimony that their plight is due to unique circumstances, and that the variation, if granted will not alter the essential character of the locality. Since the Statute and the municipal ordinance require that all three of these essential conditions be proved by the evidence, and in our opinion two of them are not so proven, the motion or petition of the plaintiffs for the variance was properly denied. The decision of the Zoning Board of Appeals should have been affirmed by the Circuit Court.

It is the order of this court that the order in this cause, of the Circuit Court of Wagoner County, entered June 30, 1937, be and the same is hereby reversed and the decision of the Zoning Board

of Appeals of the City of Springfield, Illinois, dated June 20, 1957, be and the same is hereby affirmed.

Circuit Court reversed and Zoning Board of Appeals affirmed.

ROETH, P.J., and CARROLL, J., concur.

47643

KANKAKEE AUTO LEASING CO., a
corporation,

Appellee,

v.

EDWARD HEMPHILL,

Defendant,

GENERAL FIRE AND CASUALTY COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal by a garnishee defendant from a judgment entered in a garnishment proceeding, involving an automobile insurance policy issued to the judgment debtor. Liability was denied by the insurer on the premise that the insured had failed to co-operate in the defense of the basic action. It is admitted that the policy was in force at the time of the accident.

The original action arose out of an accident involving an automobile driven by defendant Edward Hemphill. General Fire and Casualty Company, the garnishee defendant, undertook the defense of the suit through its attorneys. The trial was set for December 11, 1957, and on that date Hemphill did not appear in court. His attorneys of record reported his nonappearance to the trial court, did not ask for a continuance and, with leave of court, withdrew their appearance for him. The court reset the trial for December 20, 1957, and on that date an ex parte judgment was entered against Hemphill for \$448.04 and costs.

Plaintiff, the judgment creditor, instituted a garnishment action against the insurer, and a nonjury trial resulted in the garnishment judgment, which is the subject of this appeal.

A garnishment proceeding must be based on a claim on which the judgment debtor, himself, could have maintained an action against the garnishee. (Zimek v. Illinois National Casualty Co., 370 Ill. 572, 576.) A policy of insurance is a contract between insurer and insured. Refusal of co-operation by the insured, in the defense of an action against him for a cause covered by the policy, is a breach sufficient to prevent recovery on the insurance policy by either the insured or anyone for his use. (Schneider v. Autoist Mutual Ins. Co., 346 Ill. 137, 140.) As a reviewing court, we will accept the findings of the trial judge upon questions of fact, unless such findings are clearly and palpably erroneous. 2 I.L.P., Appeal and Error, par. 786; Western & Southern Life Ins. Co. v. Brueggeman, 323 Ill. App. 173.

It was incumbent upon the insurer to prove that it and its attorneys acted in good faith, and that Hemphill's failure to appear in court was due to a refusal to co-operate. The question of good faith is not limited to the insured but includes good faith on behalf of the insurer, and it was for the trial court to make that determination as a question of fact. Panczko for Use of Enright v. Eagle Indemnity Co., 346 Ill. App. 144.

The evidence for the insurer shows that one of its attorneys on December 6, 1957, telephoned Hemphill and informed him that his presence was necessary at the trial on December 11,

1957. Hemphill said he would be present at the trial and informed the attorney of a change of address. On December 6, 1957, a letter was sent to Hemphill by the attorneys for the insurer, confirming the trial date of December 11, 1957, and the court room number, and requesting him to arrange to appear in the office of the attorneys at 8:30 A.M. on that date, in order that they might prepare the defense. A registered mail return receipt shows December 7, 1957, as the delivery date of that letter, and on the line for the signature of the addressee there appears, in pencil, "Edward Hemphill."

On December 17, 1957, the insurer sent a registered letter to Hemphill, informing him that he had failed to comply with the conditions of the policy, which required his co-operation and appearance for trial, and that it was denying liability under the policy and its attorneys would not defend him. It also informed him of the new trial date, December 20, 1957, and suggested that he retain his own attorney and be present in court on December 20. The return receipt card, dated December 20, 1957, shows a penciled signature, "Edward Hemphill, by Angela A. Lee."

Also, on behalf of the insurer, a letter was received in evidence (presumably forwarded to it by Hemphill), dated January 15, 1958, addressed to Hemphill and written by one of plaintiff's attorneys at the direction of the trial judge, informing Hemphill that a judgment was entered against him on December 20, 1957, which would become final thirty days after that date, that supplementary proceedings would be taken to collect it and that he should notify his insurance company.

The insurer or its attorneys made no investigation to ascertain if Hemphill had actually signed either receipt or received the letters of December 6 and 17, 1957. There is no evidence as to why he did not appear on December 11, 1957, or that his absence was inexcusable and deliberate. The insurer ought not to have withdrawn its appearance December 11, without further investigation and without assurance that Hemphill's nonappearance was deliberately non-co-operative.

It is apparent that Hemphill was aware that his co-operation was required, as he did forward the summons to the insurer, and by telephone promised its attorneys to appear in court. He presumably forwarded to the insurer the letter of January 15, 1958, sent him by plaintiff's attorneys at the direction of the trial court, which suggested that he "notify your insurance company, General Fire and Casualty Company." The letter of the insurer to Hemphill, denying liability under the policy, is dated December 17, 1957, and the delivery date on the receipt is December 20, 1957. Obviously it could not have been received in time for Hemphill to either appear in court on December 20, 1957, or to secure new counsel for that purpose.

We do not believe the evidence, with all legitimate inferences that can be drawn therefrom, shows, as a matter of law, a lack of good faith and a definite refusal of co-operation by Hemphill, or shows that the insurer acted in good faith in denying liability under the policy.

-5-

The trial court was justified in finding as it did, on the evidence, against the garnishee.

For the reasons stated, we conclude the judgment against the defendant garnishee should be affirmed, and it is so ordered.

AFFIRMED.

LEWE, P.J., and KILEY, J., CONCUR.

ABSTRACT ONLY.

Illinois, was committed and that affiant has reasonable grounds to believe and does believe, that Lou O'Riordan, hereafter called the defendant, then and there was guilty of committing the same in this, to-wit: that he did assault complainant by seizing her around her arms and throwing her to the floor and lying on top of her body and committing lewd motions with his body, also refusing to leave home of complainant when [she] told him to do so."

The defendant complains that while the offense is charged substantially in the words of the statute the supporting facts in the information are not sufficient to charge a lewd or lascivious act. Counsel relies on People v. Green, 368 Ill. 242, in which case the court lays down the rule that an indictment or complaint must be framed upon the statute, that the offense must be charged in the language of the act or the facts relied on to constitute the offense must be set forth, and that in cases where the language of the statute creating a new offense does not describe the act or acts constituting the offense then both the statute and the acts must be set out in an indictment or the complaint. Here there is no question that the information substantially followed the statute. Paragraph 59a of the Criminal Code (Ill. Rev. Stat. 1957, chap. 38) provides: "An assault made with an intent to commit a lewd or lascivious act upon the person of another shall subject the offender * * *." The information charges the offense in the very words of the statute. It also sets out specifically certain acts of the defendant which it is alleged constituted the offense.

The defendant contends that the acts charged are not lewd or lascivious. With that contention we cannot agree.

The defendant also charges that in the allegation of the specific act there was **no intent** specifically set out. It is of course true that it is necessary in a case of this character to allege and prove the intent. However, the intent of the defendant at the time he committed the assault alleged in the information may properly be inferred from his acts as therein described. People v. Maffioli, 406 Ill. 315; People v. Niksic, 385 Ill. 479. The information was sufficient.

Only two witnesses testified in the trial, the complainant and the defendant. The complainant was unmarried, a high school teacher, and at the time lived in a single family dwelling unit which she had recently acquired for herself in Rolling Meadows. The defendant was a salesman for a company selling and building garages. On Friday, September 13, 1957 the defendant came to the home of the complainant. The complainant told him that she had no intention of buying a garage. The defendant asked to come in and show her his garage plans so that she would know something about the line he was selling if she should decide to build a garage in the future. They talked for a while and at that meeting he told her he was a bachelor and that there were not many single girls in that part of town, and he asked her if she had any objections to going out socially. (As a matter of fact the defendant was a married man with a small child. He testified that he had informed the complainant of that fact. This is denied by her.) At that

time she told him she was going out of town and would be back the next Sunday. He told her that he would call on Sunday, though no definite date was made. The following Sunday the defendant again appeared at her home about nine o'clock, and at that time she told him she had decided against going out with him as she did not know anyone who knew him and she was new in the community. He became angry and left. The following Wednesday or Thursday the defendant again called at her home in the afternoon and invited her to a country club formal dance the following Friday. She told him that she had another engagement and would be unable to go. He then asked her if she would like to go out for supper on Saturday and she told him that she would be busy. He then asked her to go out Sunday for supper and he told her that if she distrusted him she could drive her own car and he would take his and they would go and come separately. She said that she thought it would be all right and he left. Saturday evening she was at home working refinishing a chair. The defendant again called and asked her to go out for coffee and she told him she was not dressed and could not go. He then asked her if she would invite him in for coffee, and she told him he could come in. This was the time that the alleged assault occurred. He says that instead of coffee she gave him two drinks of whiskey. She says she gave him one drink of a cordial. The parties are in agreement that they sat or kneeled on the floor sanding a rocking chair. The defendant testified that the complainant, while they were kneeling on the floor, had told him about some romantic incidents in her life and had expressed her opinion of men, including himself, in uncomplimentary terms; that he reached over to put his arm on her shoulder to

comfort her, when she scratched his face, drawing blood, and in order to prevent any further assault on her part he forced her to the floor holding her arms. The complainant testified that she had told him when they were standing up after sanding the chair that she did not intend to keep a date which she had previously made with the defendant, and that thereupon he forced her to the floor, lay beside her and then committed the acts described in the information. The parties are in agreement that after the incident the defendant went to the bathroom to wash the blood from his face and the complainant went into the back yard and waited till the defendant came out. She told the defendant that she never wanted to see him again and he left. Shortly afterward, on the same evening, he called her and again she told him that she wanted to have nothing further to do with him. The next day he again called her with reference to the possibility of her keeping the date which she had previously made. She then went to the police and after talking to them talked with her employer, and some ten days afterward the information was filed. The trial court heard the evidence, saw the parties and believed the complainant. In our opinion the State sustained its burden of proof.

After the court had found the defendant guilty he asked if there was anything in mitigation or aggravation, and the assistant state's attorney stated that the defendant had a prior record. He subsequently modified that statement and told the court that there was no actual record. Apparently at that time he had a paper in his hand which he (the assistant state's attorney), at the request

of the court, handed him. The court then read the following:
"1955, attempted rape and sodomy. What happened to that case?"
The assistant state's attorney replied: "That was an investigation."
The attorney for the defendant then said: "Investigation, your Honor. There was never a charge made. That is why a sheet like this, your Honor, is very prejudicial to a defendant." The court then said, "April '56," and the defendant said: "Your Honor, I can explain these. I have been questioned on everything that has happened in the area since 1955. They have questioned me here in the Grimes case; in the Robinson Woods murder. I have been investigated for all those things. I have certainly never been guilty." The court then said: "How about this one in Wheeling, improper liberties with two fifteen year old girls?" The defendant said, "No, sir, charge of disturbing the peace." The attorney for the defendant then said: "A sheet like that your Honor, is very prejudicial to the defendant." The court thereupon sentenced the defendant.

Motions for new trial and arrest of judgment were overruled by the court.

The section of the statute under which the court was proceeding is paragraph 732 of chapter 38, which provides: "* * * In all cases where the court possesses any discretion as to the extent of the punishment, whether defendant has pleaded 'guilty' or 'not guilty', after conviction, it shall be the duty of the court to hear evidence as to aggravation and mitigation of the offense." This section was amended in 1953 to include persons who had pleaded "not guilty" and substituted "to hear evidence" for "to examine witnesses." The right

to submit evidence either in aggravation or mitigation of the sentence under consideration by the court may be waived either by the State or the defendant. It has been held that in an inquiry of this nature the court is not bound by the rules of evidence which govern a trial, and in People v. McWilliams, 348 Ill. 333, it was said that the court "may * * * search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and as was said in People v. Popescue, supra [345 Ill. 142], the judge should know something of the life, family, occupation and record of the person about to be sentenced. Fixing the extent of punishment for crime has not, and probably never can have, a definite scientific or philosophical basis. In the time of Sir William Blackstone there were one hundred and sixty crimes punishable by death. In this country one jurisdiction may provide no other punishment than death for murder. Another jurisdiction may not permit the death penalty at all. * * * The pertinent question in this case is whether or not the sentence * * * imposed by the court was entered after a substantial compliance with the spirit of the law." See also People v. Seger, 405 Ill. 222.

People v. Riley, 376 Ill. 364, was a case where two defendants were sentenced to death after entering a plea of guilty. The court conducted an inquiry in accordance with paragraph 732. In that hearing the assistant state's attorney read into the record what

purported to be the previous criminal record of the defendants. This so-called record showed that one defendant had been arrested nineteen years before in New Orleans but that that arrest was not followed by any prosecution or conviction; that he had been arrested twenty-two years previously on a petty larceny charge; and that the other defendant had been arrested eight years before on an armed robbery charge, on which arrest he had been discharged. The court held that such evidence was incompetent and immaterial in such an inquiry and that the introduction of such immaterial and incompetent matters could in some cases result in a reversal. However, in the Riley case the court held that those matters were not sufficient to have tipped the scales of justice against the defendants or seriously impaired their standing before the trial judge. That case was cited with approval in People v. Seger, supra, where certain confessions were admitted without being identified and various other exhibits such as an autopsy report and an alienist's report were admitted in violation of the hearsay rule. In that case the court holds that the challenged exhibits were proper inasmuch as all of them pertained either to the facts attending the murder or the background of the defendants. The court quoted from People v. Hetherington, 379 Ill. 71, where it was said: "In such a hearing the court has a right to inquire into the general moral character of the offender, his mentality, his habits, his environment, his age, his domestic relations, and the motives which influence his conduct."

In the instant case evidence that the defendant had been questioned by the police concerning various sex crimes was neither competent nor material. Such questioning, standing alone, without

a full presentation of all of the facts and circumstances connected with the prisoner's detention is outside of the purview of the inquiry under the provisions of the statute. Those matters should not have been presented to the court, nor, if they were presented to him, should not have been considered. It is obvious from a reading of the record that the assistant state's attorney did not consider the matters competent. However, he appears to have had a paper in his hand which the court evidently assumed constituted the criminal record of the defendant and the court in effect demanded of him that he present that record in spite of his reluctance to do so. The defendant's attorney stated to the court that the document was highly prejudicial to his client, and while he made no further objection in formal terms, we consider this to be adequate in view of the circumstances under which the court was given the document. Moreover, having in mind that a jury had previously found the defendant guilty and fixed the penalty at ten days' imprisonment and a fine of \$250, we have come to the conclusion that the court, consciously or unconsciously, must have been influenced by the incompetent and immaterial evidence. We have found that there was no error in the trial of the case and the court has properly found the defendant guilty of the offense charged. In People v. Atkinson, 376 Ill. 623, the court says: "Where a conviction is valid and only the sentence or judgment invalid, the judgment will not be reversed absolutely nor will it be reversed and remanded for a new trial. The rule in such case is that the judgment will be reversed and cause remanded to the trial court for the rendition of a proper judgment. (People v. Wood, 318 Ill. 388; People v. Boer, *supra* [262 Ill. 152]; Wallace v. People, 159 Ill. 446.)" Also see People

v. McWilliams, supra, a case which closely resembles the case before us. In the instant case the conviction was valid, and the cause will be remanded solely for the purpose of enabling the court to conduct a proper hearing under the provisions of paragraph 732 of chapter 38, Illinois Revised Statutes.

The judgment is reversed and the cause remanded to the Criminal Court of Cook County with directions that the court conduct a hearing under the provisions of paragraph 732 of chapter 38 and permit the State and the defendant, if they so desire, to present proper evidence in mitigation or aggravation as required by the statute, and enter judgment and impose a proper sentence upon the defendant.

Reversed and remanded with
directions.

Dempsey and Schwartz, JJ., concur.

Abstract only.

92
47649

THE MOST WORSHIPFUL ST. MARK GRAND
LODGE OF FREE & ACCEPTED ANCIENT
YORK MASONS, COMPACT, PRINCE HALL
ORIGIN, INC.,

Appellant,

v.

BARNEY STILLERMAN and BETTIE
STILLERMAN,

Appellees,

ADA S. VERBARG and HERMAN C.
VERBARG,

Intervening Petitioners below,

Appellees.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED
THE OPINION OF THE COURT.

This is an interlocutory appeal from an order entered by the Circuit Court of Cook County in a suit brought by The Most Worshipful St. Mark Grand Lodge of Free & Accepted Ancient York Masons, Compact, Prince Hall Origin, Inc., hereafter referred to as the plaintiff, against Barney Stillerman and Bettie Stillerman, hereafter referred to as the defendants, for damages growing out of an alleged breach by the defendants of articles of agreement for a deed covering land and improvements located at 4917 Drexel Boulevard, Chicago, Illinois.

In the complaint the plaintiff alleged that the defendants had wrongfully cashed certain checks of the plaintiff by canceling restrictive endorsements placed on the check by the plaintiff, as it alleged, in accordance with the terms of the contract, and further that the defendants had returned

-2-

a check refusing to cash it unless the restrictive endorsement was stricken therefrom by the plaintiff, and threatened to forfeit and terminate the contract unless payments were made by check without such endorsements. In the suit the plaintiff also asked for an injunction to prevent any default under the terms of the contract until the final determination of the suit. On June 22, 1956 an order was entered in the Circuit Court for a preliminary injunction restraining the defendants in accordance with the prayer of the complaint. On July 20, 1956 and October 23, 1956 the court entered orders refusing to vacate the injunction. On April 10, 1957 the court on the petition of the defendants ordered that a receiver should be appointed to take possession, collect rents, control and manage the premises and that the plaintiff should deliver to the receiver all its records pertaining to the premises. In the order it was further provided that the receiver should have the usual powers of receivers in like cases, including power to rent the premises, collect the rents and hold the proceeds subject to the further order of the court. It was further ordered that the receiver should not in any manner whatever interfere with the meetings of the plaintiff, provided that the meetings were conducted in an orderly fashion and without prejudice to the rights of other tenants. On June 27th the court entered an order that the receiver pay the real estate taxes on the premises but denied the defendants' motion that

-3-

the receiver use the proceeds collected by him to pay the mortgage indebtedness on the premises. .

Ada S. Verbarg and Herman C. Verbarg, hereafter referred to as petitioners, held a note secured by a trust deed on the said premises, and the said petitioners on August 28, 1957 filed a petition setting up their interest in the premises under and by virtue of the trust deed, asking that they be permitted to intervene and that a receiver be appointed to collect the rents and profits of the premises on their behalf and that the court enter a judgment against the plaintiff and the defendants to foreclose and sell the said premises. The plaintiff moved to strike the said petition and on September 20, 1957 an order was entered in the Circuit Court denying the petition of the petitioners on the ground that it was in the nature of an action to foreclose a mortgage. The petitioners thereupon filed a complaint in the Superior Court of Cook County to foreclose the mortgage on the premises, and in that suit the court entered a decree of foreclosure in favor of the petitioners, by virtue of which decree the premises were sold to the petitioners and a deficiency judgment in their behalf was entered against the defendants for the sum of \$1,172.83. In the decree the court found that the petitioners were entitled to a lien on the rents and to the appointment of a receiver.

Subsequently the petitioners filed a second petition to intervene in the instant suit, setting up the proceedings in the

Superior Court. On October 15, 1958 an order was entered in the Circuit Court allowing intervention, setting out the proceedings in the Superior Court and finding that the interests of all parties in the cause are subordinate to that of petitioners, that petitioners are entitled to a lien upon rents and to have the receiver protect their interests, and ordering that the receiver theretofore appointed should protect the lien of the petitioners (now intervenors) in the rents received and that all persons in possession of the premises be ordered to pay rent to the receiver and to attorn to him. The plaintiff on October 27, 1958 filed a ~~moti~~on to strike the petition and to vacate the order of October 15, 1958. On October 27, 1958 the Circuit Court entered an order denying the motion of plaintiffs to strike the petition of the petitioning intervenors and to vacate the order of October 15, 1958. From that order the plaintiff took this interlocutory appeal under section 78 of the Civil Practice Act (Ill. Rev. Stat. 1957, chap. 110, par. 78), and in accordance with the statute the plaintiff filed an appeal bond which recited that the appeal was from the court's order of October 27, 1958 denying the plaintiff's motion to vacate the order of court entered on October 15, 1958.

The plaintiff here contends that the appeal before us should be considered as being from the order entered on April 10, 1957 appointing a receiver as well as from the order entered on October 15, 1958. The defendants are only interested in the April order and have filed a brief in this court. This contention can be easily disposed of. As we said in Abbott v. Lee, 13 Ill.

App.2d 296, section 78 dealing with appeals from interlocutory orders is complete in itself. It provides that the appeal is perfected by filing of a bond, and in an appeal under that section no notice of appeal is necessary. The bond fixes the scope of the appeal. Engles v. Rosenthal, 274 Ill. App. 272. No appeal was taken from the interlocutory order of April 10, 1957 within the time fixed under section 78 of the statute. Since section 78 alone governs interlocutory appeals the provisions therein must be complied with, and we know of no case which holds that on an interlocutory appeal from an order entered in the trial court the reviewing court has any right to review any other orders entered in the said cause from which no appeal had been taken in apt time.

The petitioners, who were allowed to intervene by virtue of the October 15th order, have filed no brief in this court. Considering the case on the merits, it is the law that a receiver holds property coming into his hands only by the same right as the person for whose property he is the receiver, and subject to all existing and valid liens and equities upon the property at the time of his appointment. 31 I.L.P. Receivers, sec. 41; 75 C.J.S. Receivers, sec. 112. When a court of equity acquires jurisdiction of a cause and appoints a receiver to take charge of the property involved, no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver but must leave the court appointing the receiver untrammelled in its



administration of the same as the law directs, regardless of whether the original appointment was or was not erroneous, 23 Ruling Case Law, sec. 71, cited in Goldberg v. Hoffman, 262 Ill. App. 112, in which the court says:

"The appointment of the receiver in the instant case deprived the appellee (petitioner) of the power which it would otherwise have possessed to choose a forum in which to assert its rights and compelled it to resort to the court in the instant case. Here the demand that the receivership be extended to protect its interests could be acted upon only by the court appointing the receiver. The appellee (petitioner), in pursuance of the only course open to it, filed in the instant case its petition setting forth the facts showing its right to the income and containing ample prayers to entitle its claim to recognition. Parties in interest may assert their rights by intervention, notwithstanding that they may be neither necessary nor proper parties complainant or defendant to the main cause in which the receiver has been appointed. (Coleman v. Wrobel, supra; Sage v. Memphis & L. R.R. Co., 125 U.S. 361; Minot v. Mastin, 95 Fed. 734; Odell v. Batterman Co., 223 Fed. 292; Atlantic Trust Co. v. Dana, 128 Fed. 209.)"

See also Yoelin v. Kudla, 302 Ill. App. 413.

In the instant case a receiver for the property in question had been appointed by the Circuit Court. The Superior Court could not appoint a receiver for the same property, and petitioning intervenors followed the only course of action available to them. The orders entered by the trial court on October 15, 1958 and October 27, 1958 were proper orders.

The order entered on October 27, 1958, from which this interlocutory appeal is taken and which order denied the petition of the plaintiff to vacate the court's order of October 15, 1958, is affirmed.

Affirmed.

Dempsey and Schwartz, JJ., concur.

Abstract only.

633
47601

KUSPER OLD FORT DEARBORN,
Appellee,

v.

FARRELL J. STRODE (Impleaded) with
ANNE E. MOSLEY,

Defendant below,

On Appeal of FARRELL J. STRODE,
Appellant.

A
APPEAL FROM THE
MUNICIPAL COURT
OF CHICAGO.
23

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action under Sec. 80a of the Bulk Sales Act (Ch. 121 1/2 Ill. Rev. Stat. 1957) to recover \$105.50, the price of goods delivered by plaintiff to Anna E. Mosley as owner of a tavern at 3955 S. Cottage Grove Avenue, Chicago. Judgment was for plaintiff and defendant has appealed.

The theory of defendant Strode's alleged liability is that he was the purchaser of the tavern and fixtures from Mrs. Mosley, and failed to notify plaintiff, a creditor, of the sale in accordance with the requisites of the Bulk Sales Act.

Before any action will lie under the Bulk Sales Act it must be shown that a "sale, transfer or assignment" took place between the debtor and purchaser, Ch. 121 1/2 Sec. 78 Ill. Rev. Stat. (1957). Whether plaintiff met this burden of proof is the essential question in the case. We are of the opinion that the burden was not met.

The complaint alleged a "sale, transfer or assignment" between Mrs. Mosley and Strode, but there was no evidence to show an agreement of sale or passage of consideration between them. Plaintiff's bare allegation of sale was met by defendant's testimony that he purchased the premises from Mrs. Mosley's conditional seller, to whom she was in default. This testimony was not contraverted by plaintiff. The only evidence therefore is that there was no sale of the premises by Mrs. Mosley to defendant.

The judgment below was wrong as a matter of law, since there was no evidence of a sale. The judgment is hereby reversed. It is unnecessary to discuss the other point raised by appellant.

REVERSED.

LEWE, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

632
47504

WALTER EZYDORSKI,

Appellee,

v.

EDWARD KROZKA,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying defendant's motion in the nature of a writ of coram nobis (Civil Practice Act, §72), to vacate an ex parte judgment against him for possession of a store at 4250 Archer Avenue, Chicago, Illinois.

Judgment for possession was entered on September 23, 1957, defendant was evicted on October 17, 1957, and plaintiff was restored to possession of the premises. On November 22, 1957, defendant moved to vacate the judgment of September 23 and subsequently filed the instant motion and supporting affidavit, which, after hearing, was denied on February 25, 1958.

Defendant's affidavit alleges facts supporting his contention, that the judgment order of September 23, 1957, was void and invalid, because the notice given to defendant of the pendency of the suit, by substituted service by posting and mailing, was so defective as to amount to no service at all and conferred no jurisdiction over his person. The affidavit of non-residence, in which it is alleged that defendant on due inquiry could not be found, states his place of residence to be 4250 Archer Avenue, Chicago, Illinois, and defendant alleges

that plaintiff and his attorney knew defendant and his family resided at 9500 South 78th Court, Palos Township, Illinois. The envelope containing the notice, presumably mailed to defendant at 4250 Archer Avenue, was returned, undelivered, unopened and marked "Refused." A photostatic copy of the envelope shows it was addressed to "Ed Krazka, 4250 Archer Avenue, Chicago, Illinois," but it is plain that the "5" is written over the numeral "3." An examination of the notice filed by the bailiff, and containing his endorsement of posting and mailing, shows a copy of the notice to defendant to appear in court, was addressed and mailed to "4230 Archer Avenue, Chicago, Illinois."

Substituted service by posting and mailing, in a forcible detainer action, is authorized by paragraph 403, section 48 (1b), Chapter 37, Illinois Revised Statutes. Strict and literal compliance with every requirement of the constructive service statute is necessary, where service is had under its provisions. Nothing less than this compliance will invest the court with jurisdiction, and where the court fails to obtain jurisdiction over the person of a defendant, its judgment is void insofar as it concerns the person improperly included in it. Lakin v. Wood, 343 Ill. App. 372 (1951); 23 I.L.P., Judgments, §§12 and 13.

Plaintiff's primary contention is that the issues are moot, because the lease expired November 15, 1958, and as defendant has no present right to possession, the order of February 25, 1958, should be affirmed or the appeal dismissed. We do not agree. We believe this case presents a situation, taking defendant's

supporting affidavit as true, in which defendant may have substantial rights because of an eviction based upon a void judgment.

The issue before us is whether or not the court was justified, upon any basis appearing in the record, in entering the order from which this appeal is taken. We must indulge in all reasonable presumptions based on the record that the proceedings in the trial court were in accordance with the law and rules of the court. (Rossten v. Wolf, 14 Ill. App.2d 322.) However, the uncontroverted matters alleged in defendant's supporting affidavit must be taken as true. Lane v. Bohlig, 349 Ill. App. 487 (1953).

In his brief, defendant states that a hearing was had on defendant's motion and supporting affidavit, as plaintiff filed no counter-affidavit or pleadings in reply. Ordinarily, where there has been a hearing, we presume what transpired justified the order. However, in this case, the trial court denied a motion of defendant for approval of a report of proceedings, and the order denying the motion to vacate makes no findings of fact and contains no information whatever to indicate what transpired or was considered at the hearing. Therefore, the record before us contains nothing from which we can determine why the trial court did not rule in defendant's favor on his supporting affidavit. We cannot tell what the trial judge considered or had in mind at the hearing of the motion.

We conclude the order denying the motion to vacate should be reversed and a full hearing had in the trial court on defendant's motion, to determine whether the trial court had proper jurisdiction of the defendant at the time of the entry of the ex parte judgment in question. Therefore, the order of February 25, 1958, is reversed, and the cause is remanded to the trial court with directions to proceed in accordance with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.

34
47655

PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,)
v.)
WALTER DOLAN, etc.,)
Plaintiff in Error.)

WRIT OF ERROR TO THE
CRIMINAL COURT OF
COOK COUNTY.

21

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review the record of the Criminal Court of Cook County, where, in a nonjury trial, after a plea of not guilty, defendant was found guilty of obtaining a signature to a written instrument by false pretenses. A motion to quash the indictment made before trial was denied, as were post-trial motions for a new trial and in arrest of judgment. The case is before this court on the common law record alone.

The indictment consists of one count, and the provisions of the statute on which it is based are:

"Whoever, with intent to cheat or defraud another designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined * * * and imprisoned * * *." (Par. 253, Chap. 38, Ill. Rev. Stat. 1957.)

In substance the indictment charges that the defendant, Walter Dolan, and Ronald Ziedman, on the 12th day of August, 1957, fraudulently, knowingly and falsely pretended to Catalino Castro that they could obtain, for him, food from a government food store, at a price equal to one-half of his weekly food bill; could provide a freezer for the food, without his purchasing it; could obtain

better and cheaper housing for him in a government housing project; and could obtain for him a better paying government job. Whereas, Dolan then knew that he could not do so. The indictment further charges:

"Which false pretenses were made by the defendant with the design and for the purpose to induce said Catalino Castro 'to sign and execute a certain written instrument, to wit: Conditional Sale Agreement with a wage assignment attached thereto,' and said Catalino Castro relied upon said false pretenses, believed them to be true, was deceived thereby, and was induced by reason of said false pretenses to sign and affix the signature of said Catalino Castro to said written instrument, and to deliver said instrument to the defendant; and by means of said false pretenses the defendant obtained signature to said instrument with the intent to cheat and defraud said Catalino Castro."

The question is whether the indictment was vulnerable to a motion to quash or in arrest of judgment for vagueness and insufficiency.

The State contends that the point is waived because defendant's plea of not guilty was not withdrawn before the motion to quash was made. The motion in arrest of judgment preserved for review the question of defects in the indictment and opens the entire record for examination in this court for any apparent defect, even though there was no motion to quash or such motion was not made in apt time. People v. Green, 368 Ill. 242 (1938); People v. Plocar, 411 Ill. 141, 146 (1952).

An indictment must be free from uncertainty and ambiguity and must give defendant enough information to prepare his defense and be sufficiently definite to be pleaded in bar for a subsequent prosecution for the same offense. (People v. Green, 368 Ill. 242.) If an instrument which is a basic factor in an

offense is not set out in haec verba, sufficient facts should be pleaded for the defendant to be informed of the precise nature and details of the "instrument in writing." People v. Rice, 383 Ill. 584.

The fraudulent obtaining of a "signature" is not enough to constitute an offense. The instrument signed must be such as might possibly cause loss or injury to the person signing it, and it must be one of value or of such a character as exposes the signer to liability as soon as it is signed. People v. McConnell, 11 Ill. App.2d 370; 35 C.J.S., §27, p.670.

The allegation that Castro was induced "to sign and execute a certain written instrument, to wit: Conditional Sale Agreement with a wage assignment attached thereto," is supported by no facts in the indictment to definitely identify the written instrument as possessing legal efficacy or to permit the court to determine if it created some legal obligation which was enforceable in courts of law. An examination of the indictment does not disclose a single fact from which the court, or Dolan, could tell definitely, or even guess, what the "written instrument" contained, or if it was a "Conditional Sale Agreement with a wage assignment attached thereto." He was compelled to defend against a conclusion of law rather than a statement of facts. He was not given enough information about the instrument, the signing of which was the basis of the offense, to prepare his defense, nor was the description sufficiently definite to be of any value as a bar to further prosecution. An accused should know precisely what he is to defend against. People v. Brown, 336 Ill. 257, 262 (1929).

Our conclusion is that the indictment does not contain sufficient facts from which a court could determine that some legal obligation was incurred by Castro when he signed the written instrument in question, nor does the indictment sufficiently inform Dolan of the charge against him, so as to enable him to prepare a defense or to plead a conviction as a bar to a subsequent prosecution.

This indictment is insufficient to charge a crime and could not be helped by a bill of particulars. (People v. Flynn, 375 Ill. 366, 371 (1941).) Therefore, it is unnecessary to discuss the inadequate bill of particulars which was filed by the People or other points argued by Dolan.

If an indictment is insufficient it is error to overrule a motion in arrest of judgment, and on review the proper order is one of reversal without remanding. (People v. Green, 368 Ill. 242, 251; People v. Plocar, 411 Ill. 141, 146.) Therefore, the judgment must be and it is hereby reversed and the plaintiff in error discharged.

REVERSED.

LEWE, P.J. AND KILEY, J., CONCUR.

ABSTRACT ONLY.

Abstract

A

631

STATE OF ILLINOIS
CIRCUIT COURT
11th DISTRICT

General No. 19227

Vol. n o. 9

Norman E. Constant, et al.,

Petitioners-appellees,

vs.

Williamsville Fire Protection District, etc.

Defendant-appellant.

Appeal from the
County Court of
Madison County

REYNOLDS, J.

This cause involves nine petitions to detach nine definite and distinct areas from the Williamsville Fire Protection District. Each petition is by a different group of owners and there is no overlapping of areas by any of the petitions. While there were nine separate petitions they were filed as a group and one filing fee was paid and one summons issued and served on the defendant. The defendant filed it's motion to strike eight of the petitions on the ground that the court had no jurisdiction of any petition other than the one entitled Norman E. Constant et al. v. Williamsville Fire Protection District, since only one filing fee was paid

60214

and only one summons issued, said summons being entitled Norman L. Constant et al. v. Williamsville Fire Protection District. This motion was denied, and thereafter the defendant filed its answer to each of the nine petitions, the answers in each case raising the issues that the granting of the petitions would leave a fire protection district that was non-contiguous and denying the allegation in the petitions that the disconnection or detachment would not result in isolation of certain areas of the fire protection district. The County Court of Sangamon County, on July 11, 1959, entered its order as to each petition, granting the petition and detaching the land described in the petition from the fire protection district. From these nine orders, the defendant appeals to this court.

The defendant raises two questions on its appeal. 1. That the County Court had jurisdiction of the petition of Norman L. Constant, et. al, only, that being the only petition for which a filing fee was paid, a summons issued and a case number assigned, and that the court erred in not granting defendant's motion to strike the other eight petitions. 2. That the granting of the petitions to detach created a fire protection district which could not be organized under the Fire Protection District Act, and that the district resulting from the granting of the petitions was non-contiguous.

The nine petitions were filed on the same day, February 26, 1957. Each petition was entitled with the names of the particular petitioners involved in that petition, and the common defendant was the fire protection district. In making up summons the County Clerk made up a consolidated list of all petitioners to all nine petitions as petitioners, and copies of these nine petitions were all attached to the summons. Only a single filing fee was paid. The defendant contends that each petition is a separate suit and that nine separate suits or petitions should have been filed, nine summons issued and nine filing fees paid, and that in this case the petition headed by Norman E. Constant was the only one that paid the filing fee, had a summons issued, a number given the cause and that the others should have been stricken. In support of this position, the defendant cites Chapter 110, Section 13, (Illinois Revised Statutes). This section only provides that every action unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint, and that the clerk shall issue summons upon request of the plaintiff. The defendant also cites Supreme Court Rules No. 2, 5 and 6 respectively Sections 101.2, 101.5 and 101.6 of Chapter 110, Illinois Revised Statutes. There is nothing in these rules that bear out this contention. Rule 2 provides for the issuance of the summons, bearing the names of all plaintiffs and all defendants. Rule 5 provides for a copy of the

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

complaint to be attached to the summons. Rule 6 provides for the form of papers filed. An examination of the records in this cause discloses no violation of any of these rules but on the contrary shows that a filing fee was paid, that a summons was issued, that the summons contained the names of all plaintiffs and all defendants, that a copy of all nine petitions was attached to the summons and that summons was issued according to law. This court adopts the language of the trial court where it was said: "It seems to be a matter of small consequence now whether it is to be treated as (a) 9 petitions covering 9 separate areas arising out of the same transaction with common basic questions of law and fact and joined together for administrative convenience for trial, or (b) a single petition with 9 separate counts with common questions, etc., or, (c) a single petition with 9 separate tracts which in the aggregate constitute the area seeking detachment."

However, if there had been any merit in the contention of the defendant that eight of the petitions should have been stricken, after its motions to strike had been denied the defendant filed its answer on the merits to each petition. This action waived all objections to process. Section 20, Chapter 110, Illinois Revised Statutes (1957). The answer constituted a general appearance and a general appearance waives any question of process, and consents to jurisdiction of the

person.

The second point raised by the appeal is that by granting the detachment as prayed in the petitions, the court actually created a fire protection district which could not have been organized under the Fire Protection District Act, and that the district remaining after the detachment was a non-contiguous area. Since this is a two pronged contention, one dealing with the creation of fire protection districts, and the other dealing with disconnection from an organized fire protection district, it is necessary to consider the language of the statutes appertaining. Chapter 127 $\frac{1}{2}$, Section 31, Illinois Revised Statutes (1957) sets up certain basic requirements for the formation of a fire protection district, which are five in number. Of these five requirements only one is involved here, namely, that the area making up a fire protection district shall be an area of contiguous territory. Chapter 127 $\frac{1}{2}$, Section 36, Illinois Revised Statutes, (1957), provides for the disconnection of border areas of a fire protection district, with the requirements that the area sought to be disconnected shall (1) contain one hundred or more acres; (2) is located on the border of the fire protection district; and (3) which, if disconnected, will not result in the isolation of any part of the fire protection district from the remainder of the fire protection district.

Williamsville Fire Protection District, when organized in November

1956, was a compact area, approximately 7 1/2 miles long and 5 miles wide. It contained about 41 square miles and its perimeter was 100 miles. After the detachment, only about one third of the land originally in the fire protection district remained as part of the district. The remainder resembled a jigsaw puzzle, with a number of the larger pieces missing.

However, an examination of the map of the fire protection district after the detachment, (Defendant-appellant's brief - page 13), shows that all of the land remaining in the fire protection district is connected and that while there are a number of irregular shaped areas, each is connected to the whole and there is no enclavage and no points where the only connection is by touching corners. This map also shows that all the detached areas touched or bordered upon the perimeter or border of the fire protection district, before the detachment.

The defendant contends that the granting of the disconnection or detachment of the areas described in the petitions created a fire protection district which could not have been organized under the Fire Protection District Act. This contention must rest upon the theory that the land in the fire protection district after disconnection or detachment was allowed, was not "contiguous territory" as required in the Statute. Ordinarily, the word "contiguous" is understood to mean

touching or adjoining. However, the dictionaries define "contiguous" both as "in actual contact; touching" and "near, though not in contact". Courts in other jurisdictions have construed the word to mean "in actual contact, touching, or neighboring or adjoining" - Smith v. Blairsburg Independent School District 159 N. W. 1027, 1028, 179 Iowa, 500, or "near to, but not touching, not being synonymous with 'adjoining' ", Northern Pacific Ry. Co. v. Douglas County, 130 N. W. 246, 248, 145 Wis. 288. Our Illinois courts have held generally that "contiguous" means in actual or close contact. Langlois v. Cameron, 66 N. E. 332, 334, 201 Ill. 301. In the case of People ex rel. Montgomery v. Lierman, 415 Ill. 32, the boundary lines of the cities of Urbana and Champaign looped around a cemetery and then joined again. The court in that case said: "In giving effect to the word 'contiguous' no strained, strict or unusual definition should be applied, but practical and common sense should prevail by adopting the sense best harmonizing with the context and promoting the apparent policy and objects of the legislature in the light of the general purposes of the act." And the court in that case distinguished the facts in that case from that in the case of Morgan Park v. City of Chicago, 255 Ill 190, where the boundary lines of the village of Morgan Park and the City of Chicago were held to not be contiguous. In the Morgan Park case, while the boundary lines of the village and the city were the same for some distance, there was a break in the lines for one and three-quarter

miles, and lying between the village and the city of Chicago, a distance of two hundred acres or less, which was unincorporated territory, the town of Calumet. In the Chicago line, the distance was only a short distance, and the line of the Chicago line, the Morgan Park-Chicago line it was also a short distance, and it could not have been contiguous, using a line of land, and it sought to be accomplished by the statute.

In the case of Ill. v. People, 22 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

one strip to the other without passing over or upon land not within the village. And the court condemned as a subterfuge, the attempt to include a tract of land approximately one-half mile from either strip 570 feet wide extending one mile southwardly from the main body of the proposed village, by connecting it with a half-mile long strip only 50 feet wide. However, the court in that case only held that the two strips that cornered on each other were not contiguous, and dismissed the petition to incorporate as to the other tracts on the ground that the connection of outlying areas by long narrow strips was a subterfuge.

The case of People ex rel. Taylor v. Chicago Community Consolidated School District, 313 Ill. 381, cited by defendant, and the case of People ex rel. Dixon v. Com. School Dist., 2 Ill. 24-54, both an authority for the proposition urged by the defendant that territory can or be so detached from community school districts as to leave the remaining territory of such school districts in separate bodies not contiguous. That is unquestionably, the law. However, the question to be determined in this cause, is whether the land so left in the fire protection district, after disconnection or detachment of the areas allowed to be disconnected or detached, although irregular in shape, and in some instances only connected by a narrow strip, is, in fact, contiguous. It is apparent that the remaining area of the fire protection district has a continuing, connected boundary line. It is also apparent that unlike the tracts in the case of Wald v. The People, 227 Ill. 550, none of the tracts were connected only by cornering with each other. In the case of People ex rel.

Dixon v. Com. School Dist. 2 Ill. 2d 454, that court said: "In discussing the meaning of the terms 'compact and contiguous' as applied to school districts we recently stated in People ex rel. Warren v. Drummet, 415 Ill. 411, 'The statutory command that the territory be contiguous and compact does not admit of an all-inclusive definition drawing hard and fast lines. As said in People ex rel. Leighty v. Young, 301 Ill. 67, "It is impossible, of course, to give a definition of the terms 'community,' 'compact,' and 'contiguous,' when applied to school districts, that will apply ^{under} / all circumstances." And, more recently, "The territory of a school district is compact and contiguous when it is so closely united and so nearly adjacent to the school building that all the students residing in the district, their ages considered, may conveniently travel from their homes to the school building and return the same day in a reasonable time and with a reasonable degree of comfort. . . ."

Applying the rules laid down by the cases cited above this court is of the opinion that the territory remaining in the Williamsville Fire Protection District, after detachment or disconnection of the areas described in the petitions for detachment and the order of the court detaching the same, was so contiguous as to comply with the provisions of the statute requiring that the territory within the fire protection district should be contiguous. There was no part of the

fire protection district left isolated or apart from the parts of the district, and each part after detachment was connected to the whole. Consequently, there was no isolation of any part of the district, no separation or intervening area or tract, and no encroaching. It is unfortunate that the owners of the lands sought to be detached seek detachment, but the language of the statute must be given its plain, ordinary and common sense meaning. It is the opinion of this court that "contiguous" means connected to and adjoining, with no intervening boundary line. It is further the opinion of this court that "apart" means to be apart and away from the other, and not connected in any way. Here there was no isolated tract or area of land, and within the plain meaning of the word "contiguous" the lands within the fire protection district contained a number of irregular parcels, but all of them had a common boundary, all adjoining and connected.

It is not the province of this court to make laws but only to interpret them. If the Legislature had seen fit to limit to a fire protection district to be compact and of a certain size, a different situation would arise. But where the only requirement is that the land sought to be incorporated into a fire protection district be an area of "contiguous territory", we cannot interpret the meaning of the word to mean more than its ordinary, usual and common sense meaning. And where the only limitation urged against the act is that it

would isolate certain portions of land, and on inspection of a map of the area, after detachment fails to show any isolated area, there can be only one conclusion, namely that the requirements of the Statute have been met, and that the detachments were legal and proper.

The judgment of the County Court of Sangamon County will be affirmed.

affirmed.

BOETH, P.J., and CARROLL, J., concur.

FORMER, B.F., AND CO. INC., 100 N. 1ST ST., CHICAGO, ILL.

59
47612 ✓

THOMAS GEARICA,

Plaintiff - Appellant,

v.

LOUIS BOULABANIS, d/b/a HI-BALL
LOUNGE, 22 North Crawford Avenue,
Chicago, Illinois and MILTON L.
AARON,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

21

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action under the Dram Shop Act, Ill. Rev. Stat. 1957, ch. 43. Defendants' motion to dismiss was sustained. Plaintiff appeals.

The alleged cause of action accrued on September 22, 1955, and the complaint was filed on May 23, 1957. The Dram Shop Act was amended in July, 1955, effective July, 1956, to reduce the period of limitations thereunder from two years to one year.

Plaintiff contends that the amendment cannot be applied retroactively so as to bar this action.

However, the 1955 amendment has been retroactively applied in Huckaba v. Cox, 14 Ill.2d 126 and Seal v. American Legion Post No. 492, 245 F.2d 908. Since the 1955 amendment is substantially the same as the 1949 amendment which provided a two year period of limitations, cases construing that amendment will also be useful in reaching a decision here. The 1949 amendment has been retroactively applied in Orlicki v. McCarthy, 4 Ill.2d 342, and Fourt v. DeLazzer, 348 Ill. App. 191. Likewise, the provisions of both amendments limiting the amount of damages recoverable have been applied retroactively in Flores v.

646

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(First Division)
FEBRUARY TERM, A. D. 1951

RONALD M. PEARSON, by his
Father and next Friend,
WALDON PEARSON, Plaintiff,

vs.

JAMES HANSFORD, et al.,
JAMES HANSFORD, et al., for
use of RONALD M. PEARSON,

Plaintiff-Appellee,

vs.

RURAL INSURANCE EXCHANGE,
(A Reciprocal) Garnishee,

Garnishee-Appellant.

Appeal From:
Circuit Court
McHenry County

SPIVEY -- P. J.

The instant action is a garnishment proceeding brought against Rural Insurance Exchange (A Reciprocal). Judgment was in favor of James Hansford for the use of the Plaintiff, Ronald M. Pearson, in the amount of \$10,000.00. The trial was before the court without a jury.

Garnishee-appellant seeks to reverse the judgment of the trial court and contends that the decision and judgment is against the manifest weight of the evidence and contrary to the law. Garnishee contends that the renewal premium was tendered to the Reciprocal or its authorized agent after the expiration date of the policy and after the accident. Garnishee-appellant also claims that Peshia had no authority to bind the Reciprocal

on renewal and that the Reciprocal has not accepted the renewal premium and has never renewed the insurance.

Garnishee-appellant makes the further claim that the trial court erred in denying it a jury trial.

This appeal raises no questions as to the trial court's rulings on the admissibility of evidence. Yet, it is safe to say that nine-tenths of appellant's abstract of the report of proceedings in the trial is in question and answer form. We have been compelled to examine the entire report of proceedings in order to pass upon the errors assigned. Abstracts of this kind have often been condemned. (Schwitters v. Springer, 233 Ill. 432, 84 N.E. 497; Robert Holmes & Brothers, Inc. v. Industrial Commission, et al., 391 Ill. 277, 63 N.E. 2d. 303.)

Rule 6 of the Uniform Illinois Appellate Court Rules provides in part, "If the record contains the evidence it shall be condensed in narrative form so as to present clearly and concisely its substance. The abstract shall be preceded by a complete index, alphabetically arranged, indicating the nature of each exhibit, i. e., Will, Trust, Deed, Contract and the like.

Rules of court are adopted to promote the work of the court and they have the force of law. (Department of Finance v. Sheldon, 381 Ill. 256, 44 N.E. 2d. 86; 3; Guyre v. Sloan Valve Co., 367 Ill. 489, 11 N.E. 2d. 963.) Failure to comply with this rule places an unnecessary burden on this court. (Perks et al. v. Perkins, 158 Ill. App. 530.)

Neither does appellant's abstract index comply with the rule in that it fails to indicate the nature of the exhibits, nor were the exhibits abstracted or appended to the abstract. This, too, has been frowned upon. (Pope Metal Co. v. Sandoval

Zink Co., 148 Ill. App. 444.) Appellant filed an additional and supplemental abstract of record attempting to correct the improper indexing and abstracting of the exhibits. This additional and supplemental abstract was filed after the filing of appellant's brief and argument; however, it fails to lessen the burden of this court for reference to the exhibits in appellant's brief and argument were made to the original abstract.

We call this to the attention of counsel so that the court will not again be inconvenienced in this manner.

Prior to August 23, 1956, Mrs. Jeanne Hansford made application with Wilbur L. Peshia for an automobile liability insurance policy with Rural Insurance Exchange, (a reciprocal), garnishee-appellant. Peshia was the agent of the garnishee-appellant and was designated a broker or agent by the terms of the policy. On August 23, 1956, the policy covering a 1953 Mercury was issued effective to February 23, 1957. The policy was Number 12722. The premium was paid to Peshia or an employee. The policy application provided that "no risk is bound until the policy is issued", and the policy contained no provision relative to renewal.

On February 8, 1957, Mrs. Jeanne Hansford traded the 1953 Mercury for a 1956 Mercury and requested a change of car endorsement. On February 22, 1957, Mrs. Hansford mailed her check to Peshia in the amount of \$34.80 and wrote upon that check "Policy No. 12722." On February 28 or March 1, 1957, she notified Peshia that the 1956 Mercury, driven by James Hansford, had been involved in an accident. Subsequent to that date she received a change of car endorsement dated February 28, 1957, and signed by the facsimile signature of Robert I. Jacobson, President and a licensed agent of garnishee-appellant. Bernice Zimmerman,

4. The following information is available for the year ended 31st March 2014:

assistant sales manager of garnishee, testified that the change of car endorsement was issued by Peshia or someone in his office.

Mrs. Hansford's check, drawn to Peshia for the renewal premium, was deposited by Peshia in his account with the Aurora National Bank on March 1, 1957. By check dated February 28, 1957, received by garnishee on March 1, 1957, Peshia forwarded renewal premiums in the amount of \$118.38 which included the renewal premium on policy number 12722 and other renewal premiums on other policies, less Peshia's commissions. Garnishee-appellant credited Peshia's account in the amount of \$118.38 and appropriate debits were charged to the account when renewals were issued. No renewal was made for policy number 12722, and no debit for that premium was charged to Peshia's account. However, garnishee-appellant's records do not show a return of the renewal premium and the record is silent as to whether or not the renewal premium was ever returned to Mrs. Hansford by Peshia.

In April of 1957, Ronald Pearson filed suit for personal injuries against James Hansford. Mrs. Hansford received a summons dated April 10, 1957, and immediately directed it to the garnishee-appellant. She received a letter from garnishee-appellant dated April 16, 1957, returning the summons and stating that her policy had lapsed for failure to request a policy renewal. No defense to the suit by Pearson was tendered by the garnishee-appellant to James Hansford.

Thereafter, Ronald M. Pearson recovered a \$15,000.00 default judgment against James Hansford for injuries suffered in an automobile collision on February 28, 1957. James Hansford was the son of Mrs. Jeanne Hansford and the permissive user of the vehicle at the time of the collision.

A large part of the record was concerned with the question of whether the check was dated February 22, 1957, or February 25, 1957. We do not believe a determination of this question should or would be controlling. Garnishee's agent, Peshia, did, in fact, accept Mrs. Hansford's check in payment of the renewal premium and so far as the record discloses, either he or the Reciprocal retains the premium.

It was said in Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463, and quoted in Hancock Life Insurance Co. v. Schlitz, 175 Ill. 284, 51 N.E. 795, "The question in cases of this kind is not what power did the agent in fact possess, but what power did the company hold him out to the public as possessing. * * * It is immaterial what may have been said in the policy in regard to payment of the premium. It was within the power of the company, acting through its agents, to change entirely the mode of or dispense with the payments as provided by the policy and adopt a different mode and time of payment."

An agent acting within the apparent scope of his authority may determine how the premium then due shall be paid, whether by cash or credit or otherwise, and may adopt a different mode and time of payment. Vandasant v. Fidelity Phenix Fire Ins. Co. of New York, 249 Ill. App. 231; Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463; Fisher v. Associated Underwriters, Inc., 294 Ill. App. 315, 13 N.E. 2d. 809; Milwaukee Mechanic's Ins. Co. v. Schallman, 188 Ill. 213, 59 N.E. 12; Morris & Company v. Rhode Island Ins. Co., 181 Ill. App. 500; John Hancock Mut. Life Ins. Co. v. Mann, 86 F. 2d. 783; Maltly v. Empire Auto Insurance Assc., 239 Ill. App. 532; 85 A. L. R. 751n.

Appellant places strong emphasis on that wording in the application form which reads, "No risk is bound until policy

is issued." This argument is not convincing for that wording obviously applies to the issuance of the original policy. Again garnishee offered no evidence as to whether or not their notice of renewal premium contained like verbiage nor whether a new policy would issue or merely a renewal receipt.

Without again reiterating the evidence, we hold that the acceptance of the renewal premium was binding on the garnishee being within the apparent scope of its agent Poshia's authority.

No evidence was offered on behalf of the garnishee as to when the check was mailed to or received by Peshia. However, Peshia was not called as a witness on behalf of the garnishee-appellant. Any presumption arising from the failure to call a witness will be against the party to whose interest the witness would most likely incline. In this case Peshia was the agent of the garnishee-appellant. ~~It is failure to call Peshia as at least some evidence in favor of the garnishee.~~ (Zimmerman v. Zimmerman, 149 Ill. App. 231; Staff v. Steiger, 189 Ill. App. 43; In re Estate of Sandusky, 321 Ill. App. 1, 52 N. E. 2d. 285.)

Appellant's contention that the trial court erred in denying a jury trial is also without merit. The matter was at issue on April 11, 1958. On April 18, 1958, notice was given to the appellant that the cause was set for trial on the non-jury call. Appellant moved for a jury trial on July 7, 1958, and this was denied. On the same date a motion for a change of venue was allowed, and trial was had on July 15, 1958.

It is contended that the denial of a jury trial deprived garnishee of its constitutional rights. We do not believe a constitutional question has been presented.

The simple answer to that contention is that garnishment is a statutory proceeding unknown to the common law.

Freeport Motor Casualty Company v. Madden, 354 Ill. 436, 188 N.E. 415, and that the constitutional guaranty of right to trial by jury pertains only to actions at law known to the common law at the time of the adoption of the Constitution. People v. Niesman, 356 Ill. 322, 190 N.E. 668.

Contrary to appellant's contention, Sections 64 and 59 of the Civil Practice Act, (Chap. 110, Sect. 64 and 59, Ill. Rev. Stat. 1957) are applicable to the Garnishment Act (Chap. 52 Sects. 1-32, Ill. Rev. Stat. 1957.)

By the 1955 amendment to Sect. 1 of the Civil Practice Act which incorporated the substance of former Supreme Court Rule 2, the excepted separate statutes were brought within the terms of the Civil Practice Act as to all matters of procedure not regulated by those separate statutes.

Section 28 of the Garnishment Act, (Chap. 62, Sect. 28, Ill. Rev. Stat. 1957) by its 1935 amendment made the provisions of the Civil Practice Act applicable in courts of record except when otherwise provided in that act.

This being so, the plain wording of Sect. 64 of the Civil Practice Act providing that a party desiring a trial by jury must file a demand therefor with the clerk, requires a written demand.

In Hudson v. Leverenz, 10 Ill. 2d. 87, 139 N.E. 2d. 255, it was held that the court does not abuse its discretion in refusing a request for a trial by jury when a timely demand has not been made as provided by Sect. 64 of the Civil Practice Act where there is no showing of reason and good cause for the failure to file the jury demand.

Absent in the report of proceedings is a showing of a written demand for jury trial or a motion for leave to file a jury demand supported by a proper showing of reason or good cause for failure to comply with Sect. 64 of the Civil Practice Act.

The judgment of the Circuit Court of McHenry County is affirmed.

Affirmed

Dove J. and McNeal J. Concur

47488

HANS JENSEN & SONS, INC., an
Illinois corporation,

Appellant,

v.

SYLVIA B. WENTWORTH,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a suit to recover \$3,223.55, the contract price for a heating boiler and its installation. Defendant answered and counterclaimed that the installation was made negligently and improperly and caused her fire damage of \$4,909.50. A single verdict found both sides not guilty. Plaintiff appeals.

The boiler was installed in defendant's building on December 15, 1954, and on December 30, 1954, a fire in the boiler room damaged the ceiling and other parts of the building. The installation violated a fire prevention ordinance of the City of Chicago (Section 80-4, Municipal Code), because the ceiling was combustible and the boiler smoke pipe less than twenty-four inches from the ceiling. The smoke pipe, after the fire, was lowered by another contractor, and the cost of this work and the estimated cost of the necessary work repairing the fire damage amounted to \$4,738. There was expert opinion evidence that the fire was the result of heat from the smoke pipe, igniting the wooden joists of the floor above, located only four to six inches distant.

By agreement, three verdicts were given to the jury: (1) finding for plaintiff on his claim and against defendant's counterclaim; (2) finding against plaintiff's claim and for defendant's counterclaim; and (3) finding defendant not guilty on plaintiff's claim, and finding plaintiff not guilty on defendant's counterclaim.

Plaintiff contends that the court erred in denying his motion for judgment non obstante veredicto. The rule is that, if there is any evidence which, standing alone, tends to establish a defense, the motion should be denied. (Weinstein v. Metro. Life Ins. Co., 389 Ill. 571, 576 (1945).) We believe the court properly denied the motion, as the expert testimony and unlawful installation were evidence tending to show negligent installation, proximately causing the fire.

Plaintiff does not show that this verdict is contrary to the manifest weight of the evidence, as this is not a case in which an opposite conclusion to that of the jury is clearly evident, as is required before this court can disturb the verdict. (Griggas v. Clauson, 6 Ill. App.2d 412, 419 (1955).) Also, plaintiff has failed to point out why this contention should be sustained.

As to plaintiff's argument that "the violation of an ordinance or statute is not ordinarily negligence per se, but only one of the elements to be considered, and in any event such violation, to be material, must be shown to have a causal connection with the action," we believe the expert opinion was ample for the jury to conclude that the smoke pipe installation, in

-3-

violation of the ordinance, was the proximate cause of the fire and consequent damage to defendant's property. We believe the installation of the smoke pipe so close to the wooden joists was sufficient to sustain defendant's claim of negligent and improper installation without evidence of the municipal ordinance violation.

Plaintiff complains that the municipal ordinance was not introduced into evidence. This was unnecessary, because Section 414, Chapter 37, Ill. Rev. Stat., required the Municipal Court to take judicial notice of the ordinances of the City of Chicago.

We believe the verdict is supported by the evidence, and the trial court was correct in denying plaintiff's motions for judgment non obstante veredicto or a new trial. For the reasons given, the judgment is affirmed.

AFFIRMED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.

47658

JOSEPH R. GUTTMAN,

Plaintiff-Appellant,

v.

MELVIN R. GUTTMAN,

Defendant-Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for slander in which plaintiff seeks to recover damages for an allegedly defamatory statement made by defendant while testifying as a witness in court. The court below dismissed the complaint, and plaintiff has appealed.

The question is whether the complaint states a cause of action. It is well settled that statements made by a witness in a judicial proceeding are "absolutely" privileged if relevant to the case, and not uttered simply out of malice without regard to relevancy (Dean v. Kirkland, 301 Ill. App. 495, 53 C.J.S. p. 168), and are "qualifiedly" privileged if not relevant (53 C.J.S. p. 172). The relevancy necessary to confer "absolute" privilege is not strict legal relevancy (134 A.L.R. 474 et seq.), but anything having possible pertinency to, or connection with, the case (Parker v. Kirkland, 298 Ill. App. 340, 361). All doubts will be resolved in favor of relevancy (Parker v. Kirkland, 298 Ill. App. 340, 361).

In the case at hand plaintiff did not set out in his pleadings the context in which the statement was made, as it

was his burden to do (Dean v. Kirkland, 301 Ill. App. 495, 510) so that the pertinency of the testimony could be determined.

Defendant, however, has set out the context of the statement in his motion to dismiss: "Q. What did you know about it (a real estate transaction)? A. It seems to me, if my memory serves me correct, my brother Joe took a girl by the name of Krismanick over several state lines, and in an automobile accident in which she broke her neck, he brought her back to the city and had to marry her on her deathbed, and it seems to me at that time he was concerned that she would have a claim against some property. I don't recall. It was for some reason or other - my mother, I believe was upset. I think that may have been the time. And she wanted the property out of her name, and conveyed it, I think, to my sister and brother-in-law."

The only words contained in plaintiff's complaint are those in italics. From this more complete transcript it is apparent that the words were not without relevancy or relationship to the case at hand, since the question concerned knowledge of a document involving a real estate deal and wives have a dower interest in lands owned by their husbands. Whether this is precisely what the witness had in mind or not we think the relationship between a land transaction and the possible existence of a wife is close enough to show relevancy and to uphold the defense of privilege.

-3-

Since the words were spoken in an "absolutely" privileged occasion it is unnecessary to determine if the words themselves were defamatory. The order of the trial court dismissing the complaint is affirmed.

AFFIRMED.

LEWE, P. J., and MURPHY, J., CONCUR.

ABSTRACT ONLY.

Abstract

678

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10200

Case No. 4.

| | | |
|--------------------------------|---|------------------|
| Willard G. Bo 1st, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| vs. |) | Appeal from the |
| |) | Circuit Court of |
| John . Bush and Henry C. Bush, |) | Champaign County |
| |) | |
| Defendants-Appellants. |) | |

BORTH, J.

Suit was brought by plaintiff for injuries sustained when he was struck by a truck owned by the defendants. The driver of the truck, not a party to this suit, was the defendants' agent. The case was tried before a jury and resulted in a verdict for the plaintiff. The court denied defendants' post trial motion for judgment notwithstanding the verdict and this appeal followed.

Defendants only assignment of error is that the lower court should have granted a judgment for defendants notwithstanding the verdict because plaintiff was guilty of contributory negligence as a matter of law and because no negligence on the part of defendants was proved. On an appeal from a ruling on a motion for judgment notwithstanding the verdict, the question presented is, whether there is any competent evidence, standing alone, together with any reasonable inferences to be drawn therefrom, taken with its intendments most favorable to the plaintiff, to support the verdict. If there is, then the motion for judgment notwithstanding

the verdict was properly denied.

The facts disclosed that immediately prior to and at the time of the accident, a strong wind and heavy snow storm were in progress, visibility was very bad and at the point where the accident occurred the snow had drifted across the highway. From a reading of the record the conditions at the point of the accident might well be described as freak weather conditions. Plaintiff and his passenger, Richard Taylor, were driving south and noted an automobile stalled on the highway a distance of some 75 feet away. Plaintiff applied his brakes and turned toward the west shoulder of the highway and became stuck in the snow. The car ahead was occupied by Clarence King and James Benway and was stalled in the middle of the west lane. Plaintiff's car came to a stop some 15 feet behind and to the west of the King car. He got out of the car on the left side with two ski mats, came to the rear and placed one of the mats under the left wheel of his car. As he was straightening up he was struck by defendants' truck. Visibility at the time was very bad, approximately 25 feet, and the wind very strong, so strong in fact that plaintiff had to hold on to the left side of his car as he went to the rear of it. Witnesses for the plaintiff, including plaintiff and Taylor, who were present at the time of the accident, and Davis, a photographer, and Culkins, an ambulance driver who went to the scene of the accident immediately thereafter, all testified that plaintiff's car was on the west shoulder of the highway with the left rear wheels some 1 to 2 feet off the pavement. A photograph in evidence lends credence to this testimony. King,

testifying for defendants, stated that the plaintiff's car was in the middle of the west lane. The operator of a tow truck that pulled plaintiff's automobile out of the snow sometime after the accident, testified that while driving north of plaintiff's automobile and while in the process of attempting to pull said automobile out of the snow, his truck was on the pavement and that he was compelled to move west of plaintiff's automobile in order to get onto the shoulder of the highway and have sufficient traction to move this automobile. He gave no direct testimony as to the location of said car. No other evidence was presented by defendants bearing on the accident.

Plaintiff testified that he was standing on the shoulder of the road at the time he was struck; that he did not see the truck; that he was facing west while placing the mat under the car, straightened up and was struck. On cross examination he was asked, "After you put the mat under you stepped back, did you, and within a short time the accident occurred?" He answered in the affirmative.

Benway testified that he was standing in front of the King car watching plaintiff as he placed the mat under the left wheel of his car, saw him straighten up and saw him struck by the truck. He did not know whether plaintiff's car was on the highway or on the shoulder. He estimated the speed of the truck at 20 to 25 miles per hour. He testified that the visibility was very poor. He further testified that after the accident he drove into town with the driver of defendants' truck, who drove between 10 and 15

miles per hour and that he, Readdy, had to direct the driver along the way.

Defendants contend that plaintiff was guilty of contributory negligence as a matter of law. The location of plaintiff's automobile, whether on or off the pavement, and the position of plaintiff, whether on the pavement or on the shoulder where struck, were vital issues of fact in this case bearing upon the question of contributory negligence of plaintiff. The evidence was to some extent conflicting on these questions. The question of contributory negligence is one which is pre-eminently a fact question for the consideration of the jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, i.e., where all reasonable minds would agree, it is not within the province of the court to substitute its judgment for that of a jury. This rule is so well established that a citation of authorities is unnecessary.

Counsel for defendants rely on Foreman Jack vs. Chicago Rapid Transit Co., 252 Ill. App. 151; Illinois Central . . . Co. vs. Oswald, 336 Ill. 270, 170 N.E. 247, and Hard vs. Westhouse, 291 Ill. App. 383, 13 N.E. 2d 1010, in support of their contention that plaintiff was guilty of contributory negligence as a matter of law. These are cases where under the facts the plaintiff was in the direct path of travel of a vehicle. In other words, the plaintiff was in a place known to be hazardous under known hazardous conditions, thereby knowingly exposing himself to danger. In the case at bar the question of whether plaintiff was on the shoulder

at a place which he might reasonably regard as safe, or on the highway in the path of oncoming vehicles, was, as we have heretofore noted a disputed question of fact for the jury to determine and not a question of law for the court to determine.

The driver of defendants' truck was dead at the time of trial and his testimony as to what occurred was not available. So far as the question of negligence is concerned, there was sufficient evidence to warrant the submission of that question to the jury. The jury could well have found that, considering the conditions existing at the place of this occurrence, the driver of defendants' truck was not keeping a proper lookout or that he failed to have his truck under proper control.

Accordingly the judgment of the Circuit Court of Champaign County will be affirmed.

Affirmed.

Keynolds, C., & Warren, J., concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

GENERAL NO. 10229

AGENDA NO. 11

H. E. Hilyard, Conservator of Patsy Joann
Lane, an incompetent person,

Plaintiff-Appellee,

vs.

John Duncan,

Defendant-Appellant.

Appeal from the
Circuit Court of
Macoupin County

CARROLL, J.

This is a personal injury action in which verdict and judgment were for plaintiff in the amount of \$3300.00.

The complaint alleged that plaintiff was riding as a guest passenger in defendant's automobile; that she was in the exercise of due care and caution for her own safety; that defendant operated his said automobile in a wilful and wanton manner and specifically that he wilfully and wantonly drove said automobile at such a high rate of speed that it overturned; drove said automobile off the highway causing it to overturn and failed to have his car under control; that as the result of such wilful and wanton misconduct, plaintiff was injured and to such an extent she is incompetent and a conservator has been appointed for her. We omit further allegations pertaining to the extent

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

of her injuries as the question of damages is not raised on this review.

The jury answered in the negative a special interrogatory submitted at defendant's request which was as follows:

"Special Interrogatory to jury: Question: Was Patsy Joann Lane, at and immediately prior to the accident in question, guilty of wilful or wanton misconduct which contributed in part to the injury in question? Answer No."

Defendant's post-trial motion for judgment notwithstanding the verdict and for a new trial was denied.

Defendant has appealed and contends that plaintiff was not a guest passenger of defendant; that plaintiff was not in the exercise of due care and caution for her own safety but was in fact guilty of contributory "wilful and wanton negligence"; that the defendant was not guilty of "wilful and wanton negligence" and that the verdict is against the manifest weight of the evidence. We assume that in using the term "wilful and wanton negligence" defendant refers to "wilful and wanton misconduct".

Preliminary to any consideration of defendant's contention that plaintiff failed to show freedom from contributory wilful and wanton misconduct, it must be determined whether such question has been preserved for review. The rule is that a special interrogatory is conclusively binding upon the party at whose instance it was given unless specific objection thereto is raised in the trial court in such parties' motion for a new trial or by motion to set aside the special finding of fact. A general objection that the verdict is contrary to the manifest weight of the evidence is

of the ... of the ...
...

...
...
...
...
...

...
...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

not sufficient to entitle a party to question a special interrogatory on appeal. In order that an objection to a special finding be effective it must be specific and a charge that the general verdict is against the manifest weight of the evidence is not sufficient. Westlund v. Kewanee Public Service Company, 11 Ill. App. 2d 10; Rubottom v. Crane Co. 302 Ill. App. 58; Weinrob v. Heintz, 346 Ill. App. 30. In his post-trial motion, defendant made no specific objection to the special finding of fact. The post-trial motion contains no specific reference to the special interrogatory and contains only the averment that there is "no evidence taken in the light most favorable to the plaintiff upon which a finding could be made that said Patsy Joann Lane was not guilty of wilful and wanton misconduct at the time of the accident which proximately contributed to her injuries". The prayer of the post-trial motion is that the verdict of the jury be set aside and that the court either enter judgment notwithstanding the verdict or award a new trial. In our opinion defendant did not raise a specific objection to the special interrogatory in the trial court and failed to move that the special finding be vacated or set aside and is accordingly conclusively bound by the jury's special finding that plaintiff was not guilty of contributory wilful and wanton misconduct.

Decision as to the other points argued by defendant requires examination of the evidence. The accident in which plaintiff was injured occurred shortly after 9 o'clock P.M. July 3, 1954 on Illinois State Highway 138 approximately 1/2 mile North of Wilsonville, Illinois. It was dark and the weather and road were good. It is not disputed that the parties were riding in a

Plymouth automobile owned by defendant. The only occurrence witnesses were the parties to the suit, both of whom testified. Plaintiff testified that she had known defendant since childhood; that the trip ending in the accident began when the parties left a tavern in Bunker Hill; that while they were in the tavern there had been some talk between them about going to a spaghetti or ravioli dinner at Benld; that plaintiff drove the car to Wilsonville where they stopped at a tavern and had something to drink; that she and the defendant had also been drinking during the day preceding the accident; that after being in the tavern 10 minutes plaintiff left and defendant remained in the tavern; that she had been sick during the journey and wanted to go home; that she started walking and because she thought someone was following her she turned around and got into defendant's car; that defendant then came from the tavern and also got into the car; that defendant then said "this is my car, I am driving"; that defendant was mad at her; that they left Wilsonville with defendant driving the car and went towards Benld; that she was seated on the right side of the car with her head laying on the back of the seat; that the speed of the car when she last looked at the speedometer while on the dirt road before reaching the paved highway was 60 miles per hour; that they were heading towards Benld; that the next thing she remembered it seemed like the car went out of control, the door flew open and she went out with the door. She had no recollection of events thereafter.

The defendant testified that he was unmarried and 57 years of age; that he had known plaintiff since she was a small child; that on the night of July 3, 1954 he talked with her in the A&R Tavern in Bunker Hill; that she wanted to go out of town and get something to eat; that she suggested going over East to a picnic in the vicinity of Gillespie or Staunton; that he told her that he was not ready to go; that he then went to a tavern across the street where he remained 15 or 20 minutes; that he returned to the A&R Tavern where he again saw plaintiff; that she still wanted to go to a picnic or somewhere; that he told her to wait as he was in no hurry to go anywhere; that she said she knew the keys were in his car and she would go anyhow; that they then got in the car and left Bunker Hill with plaintiff driving; that the car did not stop at or near Wilsonville or at any other place prior to the accident; that Route 138 makes 3 curves near Wilsonville; that the accident happened 1/2 to 1/4 of a mile East from the last curve; that he was sitting on the right hand side and plaintiff was driving; that he was tuning in the radio; that after the car went around the curve he noticed it was kind of out of control; that it first went off on the shoulder on the North side of the road; that plaintiff tried to bring it back on the road; that it started turning over; that the twisting motion of the car opened the door and plaintiff went out the left door; that the car was going at "pretty good speed" and he went out after her; that he was familiar with the road and the curves in it.

...the ... of ...
... years of age ...
... child ...
... the ...
... and ...
... and ...
... of ...
... the ...
... to ...
... with ...
... in ...
... they ...
... in ...
... and ...
... the ...
... with ...
... the ...
... several ...
... of ...
... that it ...
... the ...
... the ...

The witness Landon testified that on the night in question he saw defendant get in the car on the driver's side in Wilsonville, saw the car move away and that a half hour later he heard of the accident.

Harry Suhling who came upon the scene immediately after the accident, testified that the car was located partly on the pavement, a 1/4 mile East of the curve; that defendant was lying near the left rear wheel; and that plaintiff was on the pavement 30 or 40 feet from the car.

Lloyd Jarman testified that when he came upon the scene, defendant was under the car near the left rear wheel and plaintiff was lying 50 feet West of the car, which was 400 to 500 yards East of the curve. This witness also testified that while at the scene he heard a man ask the defendant if there was anyone with him and that defendant said no one was with him.

August Sies testified that he was at the scene and saw defendant lying in the middle of the road near the left rear wheel of the car and about 15 feet from the plaintiff.

H. E. Hilyard testified that he examined the scene the day following the accident; that he saw tire marks leading off the pavement to the North shoulder; that they continued on the shoulder for some distance and then ran back to the pavement and ended on the South shoulder several hundred feet from where they started.

Edward Schrier testified that he saw plaintiff get into defendant's car on the driver's side in Bunker Hill between

8:30 and 9 o'clock on the night of the accident and that she drove the car away.

Defendant's admitted ownership of the car raised a presumption that it was under his control at the time of the accident and the burden of rebutting this inference rested upon him. Robinson Adm. v. Workman, 9 Ill. 2d 420. In arguing that such burden has been met, defendant relies principally on the testimony of plaintiff, insisting that the same shows the trip was instigated by her; that she suggested going to the spaghetti or ravioli dinner; and that because of plaintiff's threat to take defendant's car and go to the dinner alone, he embarked on the journey only in self-defense and as a result became the guest of plaintiff. Defendant also points to the position of the bodies after the accident as being circumstantial evidence that both parties were thrown out through a door on the driver's side and that since plaintiff's body was the great distance from the car she must have been nearest the door. The only other evidence offered on this point was the testimony of the witness Schrier which is in direct conflict with plaintiff's testimony. Obviously, the evidence offered by defendant to rebut the presumption that he exercised control over the car was sharply contradicted and it was for the jury to determine whether it was sufficient for the purpose offered. Judging the credibility of the witnesses and weighing their testimony are jury functions which may not be usurped by the court. We think that the jury's determination that defendant was the driver of the car cannot be said to be manifestly against the weight of the evidence.

It is further contended that plaintiff has failed to establish by a preponderance of the evidence that defendant was guilty of any wilful and wanton misconduct. As has been pointed out by our courts on numerous occasions, there are no standards for determining whether wilful and wanton misconduct exists in a given case. In the recent case of Hering v. Hilton, 12 Ill. 2d, 559, the court in discussing the difficulty encountered in attempting to furnish a definition of such misconduct, had this to say:

"Wilful and wanton misconduct has been defined in myriads of cases, each one reiterating or embellishing the phraseology of its predecessors. (Streeter v. Humrichouse, 357 Ill. 234; Bartolucci v. Falletti, 382 Ill. 163; Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569; Mower v. Williams, 402 Ill. 486; Myers v. Krajefska, 8 Ill. 2d 322, 328.) One often quoted definition is that set forth in Schneiderman v. Interstate Transit Lines, Inc. 394 Ill. 569, at p. 583: 'A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' In the recent case of Myers v. Krajefska, 8 Ill. 2d 322, this court refused to overrule that definition. The Court noted that although there are some variations in the phraseology of the definitions of wilful and wanton misconduct in the cases, the basic concept as applied in the case law is the same, and since such conduct is usually a matter of degree, no hard-and-thin-line definition could be made."

A similar observation was made in Signa v. Alluri,

351 Ill. App. 11" where the court said:

1911

"The myriad of cases in which the Courts of this State have defined wilful and wanton conduct afford no simple formula by which its existence in a given case may be ascertained. Defendant argues that the distinction between wilful and wanton conduct, and negligence is a substantial one to be ascertained by the application of well-measured legal standards. While substantial differences of liability follow the determination of whether negligence or wilful and wanton conduct exists in a given case, the determination of the ultimate question itself seems to be marked by a difference of degree rather than of substance."

In view of the foregoing authorities and many others in which the same principle is announced, the question to be determined is whether the conduct of the defendant was, under the circumstances shown by the evidence, such as to warrant the jury's conclusion that it constituted wilful and wanton misconduct.

Defendant insists that even if it be conceded that he was driving the car, plaintiff failed to prove the charges of wilful and wanton misconduct as laid in the complaint. It is argued that taking the evidence in the light most favorable to the plaintiff, together with all legitimate inferences to be drawn therefrom, it does not tend to show what caused the automobile to leave the road and overturn, and suggests that the cause may have been a mechanical failure of the vehicle. Cited in support of this point are Robinson v. Workmen, 7 Ill. App. 33, 42 and Jacobs v. Illinois National Bank and Trust Co. 245 Ill. App. 30. The Robinson case referred to is of no assistance to defendant since it was reversed by the Supreme Court in Robinson Adm. v. Workman, 9 Ill. 214 to which we have previously referred. In the Jacobs case, which was a guest action, the court held it incumbent on plaintiff to prove the material allegations of his complaint by evidence, direct or circumstantial, which included proof of the guest

passenger relationship and that defendant was guilty of wilful and wanton misconduct. Both occupants of the vehicle involved were killed and since there was no proof offered as to who was driving the car or what caused it to collide with another vehicle, the Appellate Court reversed for failure to make out a case.

We cannot agree that the instant record demonstrates such lack of proof as to wilful and wanton misconduct to leave the verdict without support and vulnerable to the objection that it was the result of conjecture and speculation. The evidence is undisputed that defendant's car left the pavement and traveled from one shoulder of the road to the other; that the driver tried to bring it back on the road; that it turned over and both occupants were thrown out; that it traveled 1/4 of a mile before stopping; that the point where it stopped was a 1/4 of a mile East of where it came out of a sharp curve, which one of the witnesses described as being on right angles; and that defendant was familiar with such curve. There is also evidence that while on the dirt road just prior to reaching paved Highway 138, the car's speed was 60 miles per hour; that just prior to the accident defendant was tuning in his radio; that the weather was clear and the pavement dry and that there were no other cars involved.

It thus appears that the evidence does not leave unanswered the question as to what caused defendant's car to leave the road and overturn. That sharp curves in a highway constitute places of danger is an accepted fact. Warning of their presence is given by appropriate signs so that the precautions necessary to safe passage over the same may be taken by approaching motorists.

The evidence shows that the defendant's car left the road after going around a sharp curve with which he was familiar prior to the date of the accident. This being true, the basic inquiry is whether the defendant having notice which would alert a reasonable person of an impending dangerous situation, took reasonable precaution under the circumstances. Hering v. Hilton, supra, Foster v. Bilbruck, 20 Ill. App. 2d, 173. There is no evidence that defendant reduced his speed, applied his brakes or did anything to avoid the danger which was known to him. Because of such failure under the circumstances shown by the evidence, the defendant's acts or conduct which resulted in injury to the plaintiff constituted wilful and wanton misconduct as defined in Schneiderman v. Interstate Transit Lines, Inc. supra.

Upon a careful review of this record, we are satisfied that the findings of the jury are not manifestly and palpably against the weight of the evidence as contended by defendant and accordingly the verdict should not be disturbed. Hanck v. Ruan Transport Corp. 3 Ill. App. 2d, 372; Koch v. Lemmerman, 12 Ill. App. 2d 237; Ashby v. Irish, 2 Ill. App. 2d 9.

For the reasons indicated, the judgment of the Circuit Court is affirmed.

Affirmed.

BOETH, P.J., and REYNOLDS, J., concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10207

Agenda 3.

Jantour Corporation, an Illinois
Corporation, James Paul Delaney and
Gene C. Davis,

Plaintiffs-Appellants,

vs.

Harry E. Hibbs,

Defendant-Appellee.

Appeal from the
Circuit Court of
Mason County

REYNOLDS, J.

This cause arises out of a collision between the car in which the plaintiffs Gene C. Davis and James Paul Delaney were riding, and the car of Harry E. Hibbs, the defendant. The collision occurred on Illinois Route No. 78 about three miles south of Bath, Illinois, in Mason County. The plaintiffs Davis and Delaney were on a hunting trip and were going to a hunting lodge known as Loganberry Lodge. Gene C. Davis was driving and seated in the front seat with him was his son, Bruce Davis, nine years of age, and James Paul Delaney. Bruce was

between his father and Delaney. The party of three had left Chicago the evening before at about eleven o'clock. They had stopped at a truck or bus stop for food and then had stopped at the Rice Lake State Hunting Preserve. They had intended hunting at Rice Lake but the lake there was frozen and they decided as an alternate hunting site to go to Loganberry Lodge. When the party left Chicago, James Paul Delaney was driving and he continued to drive through the night until the stop at Rice Lake which was about six o'clock in the morning. At that point Davis took over the driving. The evidence does not disclose whether this was voluntarily or at the request of Delaney. They stopped at Bath for gas, which was about 8:15 a.m. and then proceeded south on Illinois No. 78 to the intersection with the road that leads to Loganberry Lodge. The weather was clear and the sun shining, but the road was covered with patches of ice and snow. They had been driving on pavement similarly covered with patches of snow and ice since leaving Joliet, Illinois. At the intersection, it appears from the evidence that Illinois Route 78 was covered with icy pavement for some distance on either side of the intersecting road. With Davis driving, they came to the intersection and stopped. A car was approaching from the south and Davis waited for it to pass. He saw through the rear view mirror a car coming over a rise about three-eighths of a mile to the north. The left turn indicator on the car driven by Davis was blinking. Davis saw

the car coming and upon DeLeney remarking that a car was approaching from the north, he replied that he saw the car and that he would wait until it passed. The car approaching from the north was the one driven by the defendant Hibbs. Hibbs was driving at about 45 miles per hour. He had followed the car driven by Davis from south to the scene of the accident. He saw the brake lights on the car ahead, and when he applied his brakes, because of the slippery pavement, he could not stop and his car ran into the back of the car driven by Davis. He estimated he skidded thirty-five yards, and the collision drove the car driven by Davis about 25 or 30 yards down the highway. Davis and DeLeney were injured and sue for their personal injuries. Jantour Corporation was the owner of the car used by Davis and DeLeney and the corporation sues for damages to the car. The Jantour Corporation car was a 1934 Ford Station Wagon. The rear seats of the station wagon were folded down, leaving only the front seat, in which the driver, his son and DeLeney were seated. The Jantour Corporation was wholly owned by DeLeney and his wife, and apparently the only property of the corporation was the station wagon. As an officer of the corporation and one of the principal stockholders, the car had been procured or furnished by DeLeney for the hunting trip.

The defendant filed a counter-claim against the plaintiffs for the damages to his car. The jury returned a verdict for the defendant as

of

to the claims of the plaintiffs, but found no verdict on the counterclaim. Judgment on the verdict was entered, the plaintiff's motion for new trial or in the alternative, for judgment notwithstanding the verdict was overruled, and from the judgment and order of the court, an appeal is prosecuted to this court.

The appeal raises three points. (1) That the defendant's conduct was negligent as a matter of law, and that the motion for judgment notwithstanding the verdict should have been allowed. (2) That any negligence of Davis, the driver, could not be attributed to DeLaney, a guest. (3) That the court erred in not granting a new trial, and that the jury failed to render a verdict responsive to the issues, including the counterclaim.

Considering the three points raised in inverse order, we will take up point number three first. Evidently the plaintiffs complain that because there was no finding by the jury as to the counterclaim of the defendant, the verdict was not responsive to the issues. This would have to be narrowed to this point, since the verdict of the jury as to the claims of the plaintiffs was definitely a decision on the issues presented insofar as the claims of the plaintiffs against the defendant are concerned. The counterclaim of the defendant presented another issue, namely were the plaintiffs guilty of negligence and was the defendant free from negligence? This issue the jury failed to answer by their verdict.

If the verdict of the jury had been inconsistent, a new trial would have been proper. But there is no inconsistency pointed out here. The jury may have believed that both the plaintiffs and the defendant were guilty of negligence and under our laws governing contributory negligence, neither the plaintiffs or the defendant were entitled to recover. If the verdict could be cured by the court, to conform to the issues, without invading the province of the jury, this could have been done. Roadruck v. Schultz, 333 Ill. App. 476. It is true that the verdict of the jury must conform to the issues presented. Anderson v. Krancic, 328 Ill. App. 364. It is equally true, that where an issue is presented and evidence heard in support thereof, and the jury fails to return a verdict on the issue presented, the parties are entitled to a retrial of the issues not adjudicated. Heitz v. Hersheway, 3 Ill. App. 2d 221.

Point No. 2 raised in the plaintiff's appeal is that if Davis was guilty of negligence, his negligence could not be imputed to DeLaney, a guest. It is not disputed that the Jantour Corporation was at best a family corporation, owned wholly by DeLaney and his wife. The Ford station wagon, the one involved in this accident, was apparently the only property of the corporation. To all intents and purposes, so far as this question is before us, DeLaney, as part owner, and in charge of the station wagon, was in control of the station wagon on this trip. It is true that he was not driving at the time of the accident. He was at the time of the accident and had been for some two hours, seated in the front

seat with the driver Davis. He saw the car coming from the rear and called the attention of the driver to the fact that a car was coming up behind him. There can be little question that at any time on the trip, at the desire or wish of DeLaney, he could have taken over the driving of the station wagon, and even though not driving, could have given and had the authority to give, instructions to the driver Davis as to the method of handling, driving and control of the station wagon. The question thus presented is: Under the circumstances and the facts presented, was DeLaney a guest? The plaintiffs cite a number of cases in support of their position on this point, but a reading of these cases fails to support the contention. Ziraldo v. Lynch Co., 365 Ill. 197, deals with the employer and employee situation and the guest question is not involved. Arendt v. Tallman, 10 Ill. App. 2d 66, involved contributory negligence on the part of the plaintiff and fails to deal with the guest question. Tucker v. Kallal, 350 Ill. App. 325, involves the giving of an instruction as to a guest in an automobile and does not help in this case. In Langston v. Chicago & N. W. Ry. Co., 330 Ill. App. 260 it was held that where it appeared that there was nothing apparent to any of the occupants of a car that might have prompted the doing or saying of anything to avoid accident or that indicated any negligence on the part of the driver, that in such case any negligence of the driver could not be imputed to the other occupants of the car. Staikoff v. Illinois Terminal Railroad Co., 8 Ill. App. 2d 562, was a question of negligence on the part of a bus driver that struck a car in the intersection. The question involved there was whether or not the bus driver acted with reasonable care. The case of Allen v. Wabash R. Co. 350 Ill. App. 513, was a case where the owner was not present in the car at the

time of the accident.

Whether or not one is a guest in an automobile, depends in a great measure on the facts of each case. Such issues of fact are, of course, questions for a jury to determine, in reaching their verdicts on the issues of the cause. Weinrob v. Heintz, 346 Ill. App. 30; Spies v. Sussman, 264 Ill. App. 528; Gillis v. Jursyna, 284 Ill. App. 174.

If a person riding in an automobile is a guest passenger and exercises due care for his own safety, then the negligence of the driver of the car in which he is riding cannot be imputed to him, while on the contrary, if the driver is acting as his agent or servant, then he is bound by his negligence. Stoutz v. Nicoson, 270 Ill. App. 28.

In the case of Palmer v. Miller, 380 Ill. 256, at page 260, the court said: "Where the owner of the car is riding in it, he has not only the right to possession of it but has such possession and he necessarily retains the power and the right of controlling the manner in which it is being driven unless it is shown that he has contracted away or abandoned that right. He likewise has the duty to control the driver. The inference is that the owner knew of the improper operation of the car and became responsible for the consequences of such operation."

In the case of Miller v. Miller, 395 Ill. 273, at page 282 the court said: "The question who is a guest, within the contemplation of statutes corresponding to our Guest Act, is largely a question for

determination in the individual case. (5 Am. Jur., Automobiles, p. 634, sec. 239.) A guest, it has been said, is one who is invited, either directly or by implication, to enjoy the hospitality of the driver of a motor vehicle, who accepts such hospitality and takes a ride either for his own pleasure or on his business, without making any return to or conferring any benefit upon the driver of the motor vehicle other than the mere pleasure of his company." And continuing in that case at page 283, it was said: "Similarly, we have had occasion to observe, in determining the status of a person riding in a motor vehicle, that consideration is given to the person or persons advantaged by the carriage; that if the transportation confers only a benefit incident to hospitality, companionship or the like, the passenger is a guest. On the other hand, if the carriage tends to promote mutual interests of both the person carried and the driver, or if the carriage is primarily for the attainment of some objective or purpose of the operator, the passenger is not a guest."

Immediately before the accident, DeLaney said to the driver "Gene,

there is a car coming behind us." Davis replied: "Yes, I see him," and then said: "I will wait until he will pass me." There is no evidence that DeLaney objected to waiting until the car had passed, or that he said or did anything contrary to the expressed intention of the driver to wait.

This court can see no merit in the contention that the negligence of the driver, Davis, if any, was not attributable to DeLaney.

This leaves only the contention that the defendant's conduct was negligent as a matter of law, and accordingly the motion for judgment notwithstanding the verdict should have been granted. That the defendant had a duty to keep his car under such control as to keep from striking or running into the car in which the plaintiff's were riding, is unquestioned. But, the propriety of a judgment notwithstanding the verdict stands upon the same footing as that of a motion for a directed verdict. In the case of Thomas v. Smith, 11 Ill. App. 2d 310, the question of a judgment notwithstanding the verdict was involved. The court in that case said: "If there is any evidence in the record which, taken with its intendments most favorable to the plaintiffs, tends to support the verdict of the jury, the trial court had no right to enter a judgment notwithstanding the verdict. Pitrowski v. N.Y.C. & St. L.R. Co. 4 Ill. 2d 125, 126; Mueller v. Elm Park Hotel Co., 398 Ill. 60, 63. It is only when there is no evidence as a matter of law to sustain either the plaintiff's or the defendant's claims that a judgment may be rendered notwithstanding the

verdict." While that case treats the proof as to the plaintiff, it is equally applicable to the defense of the defendant. Here the question of contributory negligence was raised by the defense of the defendant. It could only be a question of law when it could be said that all reasonable minds would reach the same conclusion, under the particular factual situation, that the evidence did not present facts, which, taken with all their inferences most favorable to the defendant, tended to prove contributory negligence on the part of the plaintiffs.

It is true that the defendant did not have his car under such control that he could avoid hitting the car driven by Davis. But the evidence showed that the plaintiff had stopped the car on the highway, and kept it there until the defendant Gibbs had traveled about three eighths of a mile. The turn indicator on the car was blinking showing that they intended to turn left. The brake lights were on. The pavement was, to the knowledge of Gibbs and the plaintiff, slippery and dangerous. If the driver of the station wagon, Davis, had gone ahead and turned to the left, the pavement would have been clear for Gibbs to continue south on the right hand side of the road. However, if the driver Davis, had decided to turn and he had his lights indicating that he was going to turn, and had turned in the path of Gibbs who would at that time be attempting to pass on the left hand side, the plaintiff could have contended that they had indicated they were turning and Gibbs should have stayed in his lane. If the Gibbs car was three-eighths of

a mile behind the plaintiff's car, it was approximately 1980 feet away. It was traveling at 45 miles per hour or approximately 66 feet per second. At that rate it would have taken full thirty seconds for the Mibbs car to travel to the point of impact. And all this time the car driven by Davis was standing on the highway, with its brake lights on, and its turn indicator lights indicating that the driver was about to make a turn off the highway to the left. These facts, which are largely undisputed, present questions of fact for the jury to decide. Whether the plaintiffs were guilty of contributing to the accident is very important in this case. Our courts have held in many cases, that such a question of fact is preeminently a question to be decided by the jury. Briske v. Village of Burnham, 379 Ill. 193; Blumb v. Getz, 366 Ill. 273; Geraghty v. Burr Oak Lanes Inc., 5 Ill. 2d 153; Ritter v. Hatteberg, 14 Ill. App. 2d 548; Cloudman v. Beffa, 7 Ill. App. 2d 276. As said in the Cloudman v. Beffa case, "Even where the facts are admitted or undisputed but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the questions of negligence and contributory negligence ought to be submitted to the jury, - it is primarily for the jury to draw the inference: Denny v. Goldblatt Bros., Inc. (1939), 298 Ill. App. 325. And a verdict may not be set aside merely because the jury could have drawn different inferences or because judges may feel, if they did, that other conclusions than the one drawn by the

jury would be not reasonable: Madison v. American Co., 1933, 37 Ill. 121."

In the case of Lock v. ..., 12, 300 Ill. 170, it was said: "The question of contributory negligence is one which is frequently left for the consideration of a jury. It cannot be said as a matter of course and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." This principle was approved in the cases of Conroe v. Illinois Terminal R. Co., 346 Ill. App. 307; Lundy v. Jenkins, 6 Ill. App. 1d 47; Miller v. ..., 12 Ill. App. 2d 346; Cloughan v. ..., 7 Ill. App. 2d 50; Conroy v. ..., 9 Ill. App. 2d 145; Trennert v. ..., 1 Ill. App. 2d 100.

Our courts have repeatedly held that the verdict of a jury on the question of fact should not be disturbed by a reviewing court and that such verdict is manifestly and palpably incorrect when it is not at all in accordance with the evidence. Roch v. ..., 12 Ill. App. 2d 137; ... v. ..., 2 Ill. App. 2d 3; ... v. ..., 3 Ill. App. 2d 30; ... v. ..., 331 Ill. App. 275; ... v. ..., 301 Ill. App. 370; ... v. ..., Illinois Terminal R. Co., 333 Ill. App. 305. In the record in this case, this court cannot say that the verdict of the jury is against the manifest weight of the evidence. As has been said many times, the trial



court and the jury has the opportunity to see the witnesses and observe their conduct and demeanor on the witness stand, and with the evidence, and the inferences taken most adversely to the defendant, presenting a question of fact as to whether the defendants were guilty or contributing to the accident, this court will not substitute its judgment for that of the jury.

The judgment will be affirmed.

Affirmed.

POETH, P.J., and CARROLL, J., concur.

10. The first of these is the fact that the

11.

12.

642

A

2
 3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

2d

The first count of plaintiffs' complaint sought to establish and enforce a mechanic's lien. The second count sought damages of \$15,000 for the alleged breach of an agreement. The motion of two of the defendants to strike Count 2 of the complaint was sustained and that count was "dismissed." The plaintiffs appeal.

There was no finding that there is no just reason for delaying enforcement or appeal as required by Par. 2 of Sec. 50 of the Civil Practice Act. Multiple claims for relief are involved in the action. There was no disposition as to the first count and it remains pending; nor does the record show any disposition of the case as to the remaining defendants. As the court did not find that there is no just reason for delaying enforcement or appeal, the order is not appealable, and is subject to revision at any time before the entry of a judgment or decree adjudicating all the claims, rights and liability of the parties. See Bohannon v. Ryerson & Sons, Inc., 15 Ill. 2d 470; Ariola v. Nigro, 13 Ill. 2d 200; Hanley v.

-2-

Hanley, 13 Ill. 2d 209; Getzelman v. Koehler, 14 Ill. 2d 398; and Biagi v. Gregory, 19 Ill. App. 2d 534.

Furthermore, the order from which plaintiffs' appeal is not a final judgment, order or decree within the meaning of Sec. 77 of the Civil Practice Act. See Aetna Plywood & Veneer Co., v. Robineau, 336 Ill. App. 339. We are without jurisdiction to entertain the appeal. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

FRIEND, P. J., and BRYANT, J., CONCUR.

CITY OF CHICAGO, a Municipal Corporation,

V. 2

Defendant-Appellant.

OF CHICAGO

FRIEND, P. J., and BRYANT, J., CONCUR.

652

47447 ✓

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. ROSE CESEK,

Plaintiff-Appellee,

v.

MARKO POKRAJAC,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a proceeding originally brought under the old Bastardy Act. The complaint was amended to proceed under the Paternity Act, and the judgment was entered in conformity with the latter act.

The Paternity Act became effective July 8, 1957. The child was allegedly born out of wedlock on May 11, 1957, before the Paternity Act became effective. The proceeding was filed on July 17, 1957, after the Paternity Act became effective.

Evidence was taken by the court below, and the court found that defendant Marko Pokrajac was the father of the child born out of wedlock on May 11, 1957, to the relatrix Rose Cesek. The evidence in this case is conflicting. There is, however, substantial evidence in the record to support the finding of the court. It is not contrary to the manifest weight of the evidence.

The court entered a judgment in accordance with the provisions of the Paternity Act providing for the payment of \$10.00 per week for the support of the child born out of wedlock and reserving for future determination the question of the maternity expenses of the mother.

In a recent case, DiBella v. Cuccio, 15 Ill.2d 580, the Supreme Court had before it a case where the child had been born out of wedlock prior to the passage of the Paternity Act. The proceedings there were instituted under the Paternity Act after its passage. In that case the Supreme Court reversed the judgment under the Paternity Act and remanded the cause with directions to determine the rights of the parties under the old Bastardy Act.

Plaintiff-appellee in this case, following the decision of the Supreme Court in the DiBella case, confessed error and requested that this case be reversed and the cause remanded with directions to determine the rights of the parties under the old Bastardy Act. Defendant-appellant, on the other hand, after the confession of error, urges that the cause be reversed and not remanded on the theory that the finding of the judge is contrary to the manifest weight of the evidence. We have already considered that contention.

The judgment of the Municipal Court of Chicago is reversed, and the cause is remanded with directions to determine the rights of the parties under the old Bastardy Act.

REVERSED AND REMANDED
WITH DIRECTIONS.

FRIEND, P. J., and BURKE, J., CONCUR.

194

A

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

24

2

We think the judgment of the court below was correct. It is conceded that defendant owes the rent, but defendant asks \$11,661.60 in damages because plaintiff failed to perform his duty to provide heat and keep the premises in repair. Defendant has alleged no such duty in his counterclaim, and has not made the lease a part of the record. Without a copy of the lease we are unable to ascertain what, if any, duty the landlord had, Giddings v. Williams, 336 Ill. 482.

The first month for which defendant refused to pay rent was October, 1955, and he did not vacate the premises until May 31, 1958. He refused to pay rent for 19 of the 32 months that elapsed between October 1, 1955, and May 31, 1958. In order for defendant to be justified in not paying rent he must show that a constructive eviction resulted from the events complained of, and in order to show this he must establish a prompt abandonment and surrender of the premises, Auto. Sup. Co. v. Scene-in-Action Corp., 340 Ill. 196, 201, Leiferman v. Osten, 167 Ill. 93, Keating v. Springer, 146 Ill. 481. This abandonment must take place within a "reasonable time" after the events complained of occur, Dennick v. Ekdahl, 102 Ill. App. 199. And 17 months has been held not reasonable, Lipkin v. Burnstine, 18 Ill. App.2d 509. There was no allegation that defendant brought the alleged violations of the lease to the attention of the plaintiff, nor that he relied on any promises of the plaintiff in staying on as long as he did, as was the case in Thirteenth & Washington Sts. Corp. v. Neslen, 254 P.2d 847, and appears to have been the case in Handelman v. Dolan, 15 Ill. App.2d 49 (Second Dist.). We conclude that if the landlord had the duty, and did not perform, defendant has waited an unreasonable time to make complaint of it, as a matter of law, Smith v. Bellrose, 200 Ill. App. 368, cited by defendant, is consistent with this conclusion.

Defendant objects that the trial court could not enter judgment on plaintiff's motion to strike the counterclaim since the plaintiff did not ask for judgment in the motion. There is no merit to this contention since Sec. 45(4) of the Civil Practice Rules of the Municipal Court permits the court "to terminate the litigation in whole or in part" after ruling on motions.

-3-

The judgment order reads "against defendant EARL COOPER in the sum of THIRTY THREE HUNDRED SEVENTY FIVE AND NO/100 DOLLARS (\$2375.00) and costs. . . ." No one questions the amount of rent unpaid. It is obvious that the scrivener made an error in writing out the sum in full. The judgment is affirmed in this court for the amount of twenty three hundred seventy five and no/100 dollars (\$2375.00) and costs.

AFFIRMED.

LEWE, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

695
47537 ✓

MEYER FIELD,

Plaintiff - Appellant,

v.

NUGENT R. OBERWORTMANN, FRANK J.
TURK, CLARENCE D. OBERWORTMANN and
ANDREW B. BARBER,

Defendants - Appellees.

APPEAL FROM THE

SUPERIOR COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to rescind the sale of bank stock. Defendants' motion to dismiss the complaint, was granted after plaintiff refused to comply with an order to join certain persons as parties. Plaintiff appeals.

On a previous appeal in this matter, 14 Ill. App.2d 218, this court reversed a ruling dismissing the action for want of equity and remanded the matter for further proceedings. That opinion adequately stated the pertinent facts and briefly outlined several possible theories of recovery. Therefore, we need consider only facts relevant to the narrow procedural issue presented on this appeal.

After a rather lengthy series of complicated transactions plaintiff and his wife, as sellers, and defendants and Arthur T. Cheadle, as buyers, executed a contract for the sale of bank stock. The contract provided for an escrow arrangement to facilitate the stock transfer. By means of this escrow arrangement over 50 persons acquired bank stock. Plaintiff now seeks to rescind this agreement.

Defendants' first motion, made under Section 48 of the Civil Practice Act, Ill. Rev. Stat. 1957, ch. 110, § 48, was to compel plaintiff to add as parties defendant the persons who acquired bank stock under the escrow, and as plaintiffs the persons other than plaintiff who had deposited stock in escrow. The court ordered them joined. Plaintiff refused to comply and made a motion to amend his complaint and add as plaintiffs his wife and himself in the capacity of trustee. The court denied this motion. Defendants then filed a motion to dismiss for failure to comply with the court order, which was granted.

The basic issue is whether the parties plaintiff refused to join are necessary or indispensable parties to this action.

Defendants contend that these persons who acquired the stock are necessary parties because they now hold the stock which plaintiff seeks to recover; that the question was properly raised by a Section 48 motion; that the affidavits filed with the motion show that there are no questions of fact here; that these affidavits do not violate the parol evidence rule in any way; and that the court did not err in denying plaintiff's motion.

Plaintiff objects to defendants' raising the question of necessary parties by motion and says that it must be raised by answer. However, since Section 26 of the Civil Practice Act, Ill. Rev. Stat. 1957, ch. 110, § 26, provides that parties may be joined or dropped "at any stage of the cause", there is no sense in requiring an answer before the question of the parties is decided and in any event, Section 48(1) (1) of the Civil Practice Act seems broad enough to include a motion similar to the one defendants made here.

A necessary or indispensable party is one who has such an interest that a final decree cannot be entered without materially affecting his interest or leaving the interests of those who are before the court in a situation inconsistent with equity. Georgeoff v. Spencer, 400 Ill. 300; Horn v. Horn, 5 Ill. App.2d 346; 29 I. L. P., Parties, § 2. In our opinion the persons who acquired bank stock under the escrow agreement are not necessary parties to this action because they were not parties to the stock sale contract, they were not under any obligation to purchase stock, and plaintiff seeks no recovery from them. The same can be said for the persons defendant seeks to add as plaintiffs. If plaintiff prevails in this action, defendants would not be required to restore the identical stock that plaintiff sold; his claim could be satisfied by other shares of the same issue which defendants own. Sher v. Sandler, 325 Mass. 348, 90 N.E.2d 536; Poole v. Camden, 79 W. Va. 310, 92 S.E. 454; Annotation, 14 A. L. R.2d 855; see also Puntenney v. Wildeman & Co., 318 Ill. 139. Defendants place great emphasis on the case of Chandler v. Ward, 188 Ill. 322, but in that case the parties added, as necessary, were holders of notes which plaintiff sought to cancel. Here, plaintiff does not seek to cancel any shares of stock, but merely to rescind the contract and recover whatever stock defendants might hold. Likewise, money damages may be awarded in a rescission action where it is impossible or impractical to restore the specific property sought. Hopkins v. Snedaker, 71 Ill. 449. Since we think this controversy can be

completely settled in the absence of the shareholders in question, we do not regard them as necessary or indispensable parties to this action. Although this disposes of the question presented, defendants have raised other points which merit comment.

Since plaintiff's wife and Arthur T. Cheadle were parties to the contract, we think the court erred in denying plaintiff's motion to add them ^{as parties.} ~~and himself in the capacity of trustee.~~

Defendants urge that their affidavits show an absence of factual issues in this case. We do not agree. The motion itself states the affidavit is contrary to the allegations of the complaint. Defendants' affidavit states that the stock was sold by plaintiff and several others directly to over 60 purchasers; and that plaintiff himself sold only a few hundred shares and defendants purchased only a few hundred. Plaintiff mentions no other persons and alleges that he and his wife sold the stock to defendants. Furthermore, in our opinion, the controversy can not be completely resolved without a determination of the issues raised by plaintiff's allegations to the effect that defendants and others illegally and improperly deprived plaintiff of his stock and that defendants took unconscionable advantage of plaintiff when he was ill by forcing and coercing him to sell the stock grossly below its actual value.

Defendants suggest that plaintiff should offer to rescind an agreement concerning the sale of the Bank building, since this sale was a "condition precedent" for the stock sale contract.

-5-

Assuming without deciding, that the real estate sale contract was consideration for the stock sale contract, we think plaintiff's offer in the complaint "to return all of the consideration received" for the stock, amounted to a sufficient tender.

We need consider no other points.

Since we have previously held, 14 Ill. App.2d 218, that the complaint states a cause of action, we think the interests of all concerned would be best served by a trial on the merits.

For the reasons given the judgment is reversed and the cause remanded with directions to deny the motion to dismiss, to grant leave to plaintiff to add ~~himself as trustee and~~ his wife as plaintiffs, Cheadle as a defendant, and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

MURPHY AND KILEY, JJ. CONCUR.

IN THE
APPELLATE COURT OF ILLINOISSECOND DISTRICT
(First Division)
MAY TERM, A. D. 1953

DONALD C. ALLENSWORTH,

Plaintiff-Appellant,

vs.

MRS. ANNE MILDRED ELLIOTT,

Defendant,

and

Re: "Wm. Ferris 1st Addition (S.D.)
1904 Original Lots 1, 2, 3, 4 & 7,
Block 2, North 120.5 Feet--Lot 14."

Appeal from the

Circuit Court of

Knox County

SPIVEY--P. J.

Plaintiff-appellant appeals from an order of the Circuit Court of Knox County dismissing his appeal thereto from a Police Magistrate's Court.

Plaintiff commenced a forcible entry and detainer case before a police magistrate. On defendant's motion the magistrate continued the hearing of the case for thirty days. It is from this order of continuance that plaintiff appealed to the Circuit Court. No other orders or judgments were entered in the magistrate's court.

Plaintiff urges no points and cites no authority bearing upon the order of the Circuit Court in dismissing the appeal. Neither does plaintiff argue any of the points urged

however remote to the appeal. We deem those points to have been waived. Rule 7 of Uniform Illinois Appellate Court Rules.

We have, however, examined the entire record and find that no error has been committed. The trial court quite properly dismissed plaintiff's appeal from the magistrate for the order of continuance does not constitute a judgment.

Article X of the Constitution and Constitution Act, Chap. 79, Sect. 115, Ill. Rev. Stat. 1957, provides for appeals from judgments of justices of the peace and police magistrates.

In I. L. P. Judgments of the Peace, Sect. 103 it is said inter alia, "The right of appeal extends and is confined to final judgment, regardless of the form thereof and covers judgments of dismissal and judgments for costs. However, as the statute provides only for appeals from judgments rendered by justices of the peace, some kind of judgment must be entered or there is nothing from which to appeal and the cause appealed to acquires no jurisdiction of the case."

A judgment is the sentence of the law pronounced by the court on the matter contained in the record; it is the law's last word in a judicial controversy, the final consideration and determination of the court of matters submitted to it in an action or proceeding, and the judicial act of the court. Orders made during the pendency of an action are not judgments. I. L. P. Judgments, Sect. 2, General Electric Co. v. Gellman Mfg. Co., 315 Ill. App. 644, 48 N.E. 2d. 451.

The order of the Circuit Court of Knox County dismissing plaintiff's appeal is affirmed.

Affirmed.

Dove J. and McNeal J. Concur

Illinois Appellate Opinions 2d

83287

You are responsible for the re-
turn of this book.

[illegible]

